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SHOW PROCEEDINGS AND ORDERS DATE: [10/11/89]

CASE NBR: [88102137] CFX STATUS: [ ]
SHORT TITLE: [McMonagle, Michael, et al.]
VERSUS [N.E. Women's Ctr., Inc.] DATE DOCKETED: [062889]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jun 28 1989		Petition for writ of certiorari filed.
Jun 28 1989		Appendix of petitioner filed.
Jul 31 1989		Brief of respondent N.E. Women's Center, Inc. in opposition filed.
Aug 2 1989		DISTRIBUTED. September 25, 1989
Sep 21 1989		Reply brief of petitioners Michael McMonagle, et al. filed.
Sep 29 1989		REDISTRIBUTED. October 6, 1989
Oct 10 1989		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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88-2137

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term. 1988

MICHAEL MCMONAGLE, et al.
Petitioners

v.

NORTHEAST WOMEN'S CENTER, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

This case arises out of a suit by a plaintiff abortion clinic against 42 individual protesters under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.§1964(c) ("RICO"). It followed over nine years of protest activities in the area of plaintiff's place of business during which petitioners and hundreds of others participated regularly in protests against abortion by engaging in demonstrations, picketing in public *fora,* chanting, leafletting and other First Amendment protected activities. Civil RICO liability was imposed on the theory that petitioners' participation in one or more of four sit-ins held at the plaintiff clinic constituted extortion under the Hobbs Act, 18 U.S.C. §1951 ("Hobbs Act"). Based upon the finding of a RICO injury in the amount of $887, petitioners were held liable for the payment of treble damages, $65,000 in attorneys fees, and over $42,000 in damages attributable to plaintiff's increased cost of doing business as a result of petitioners' protests.

This case presents the following questions:

1. Does the First Amendment bar recovery from political protesters of damages for violation of RICO and state trespass law where the damages imposed do not flow directly and proximately from four sit-ins which comprised the only unlawful activity during the course of the protest?

2. May civil liability be imposed under RICO, 18 U.S.C. §1964(c), where neither the alleged RICO "enterprise" nor the "pattern of racketeering activity" had any profit-making element?

3. Does a plaintiff corporation have standing to recover under RICO, 18 U.S.C. 1964(c), where the "pattern of racketeering activity" alleged is based solely on two predicate acts: (1) attempted Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business free of interference; and (2) Hobbs Act extortion of the plaintiff's employees' property interest in continuing their employment relationship with plaintiff, and where the jury found

that neither the plaintiff, nor its employees had been injured by the conduct alleged to have constituted extortion of employees?

4. Is participation in one or more of a series of four sit-ins during the course of a political protest where the protesters neither conspired to obtain, attempted to obtain nor obtained any tangible or intangible property an indictable offense under the Hobbs Act, 18 U.S.C. 1951(a), and a predicate offense under RICO, 18 U.S.C. 1961(1)(b)?

5. Does Federal Rule of Civil Procedure No. 51 prohibit a finding of waiver of objections to jury instructions by an appellate court where the district court failed to rule on a party's proposed point for charge, failed to instruct as requested by the party deemed to have waived its objections, and no claim of waiver was raised in the district court?

PARTIES TO THE PROCEEDINGS

In addition to the parties shown in the caption, the parties include the following: Petitioners Dennis Sadler, Mary Byrne, Deborah Baker, Margaret Caponi, Thomas Herlihy, Anne Knorr, Robert Moran [appellants in No. 88-1333]; Petitioners John J. O'Brien, Joseph Wall, Roland Markun, Howard Walton, Patricia Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen Jones, Kathy Long, Susan Silcox, Paul Armes and Walter Gies [appellants in No. 88-1334]; Petitioners Patricia McNamara and Thomas McIlhenny [appellants in No. 88-1335]; Donna Andracavage, Juan Guerra, and Helena Gaydos [appellants in No. 88-1336].

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NORTHEAST WOMEN'S CENTER, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Michael McMonagle, *et al.,* respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1-32) is reported at 868 F.2d 1342. The order of the Third Circuit denying rehearing *in banc* (Pet. App. 33-34) is not reported. The decision of the U.S. District Court for the Eastern District of Pennsylvania dated March 31, 1988 (Pet. App. 35-69) is reported at 689 F. Supp 465; the decision dated June 8, 1987 is reported at 665 F. Supp. 1147; the decision dated May 8, 1987 (Pet. App. 74-109) is reported at 670 F. Supp. 1300; the decision dated February 12, 1987 (Pet. App. 110-138) is not reported; the decision dated October, 25, 1985 is reported at 624 F. Supp. 736.

JURISDICTION

The decision of the U.S. Court of Appeals for the Third Circuit was entered March 2, 1989. The U.S. Court of Appeals for the Third Circuit denied Rehearing *In Banc* on March 30, 1989. The time for filing a petition for writ of certiorari is therefore June 28, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant portions of the Hobbs Act, 18 U.S.C. §1951, are set forth at Pet. App. 139. The relevant portions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et. seq.*, are set forth at Pet. App. 139-141. The relevant portions of the Federal Rules of Civil Procedure No. 51 is set forth at Pet. App. 142.

STATEMENT OF THE CASE

The Northeast Women's Center, Inc., a Pennsylvania for-profit corporation engaged in the business of performing first and second trimester abortions, commenced suit in 1985 against 42[1] individual defendants under, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c) and (d), seeking treble damages, attorneys fees and costs, and injunctive relief. (Pet. App. 111-112). The

1. The District Court granted motions for directed verdict on all counts as to four defendants who had engaged in protest actions at the plaintiff clinic, but who had not engaged in any sit-in, on the ground that all other protest activities at the plaintiff clinic and in connection with residential picketing were protected First Amendment activities. After disposition of all other pre-trial and post-trial motions, 26 defendants remain, all of whom are petitioners herein.

plaintiff's suit was instituted following over nine years of protest activities in the area of the plaintiff's abortion clinic during which petitioners and hundreds of others participated in protests against abortion on demand by regularly[2] engaging in sidewalk counseling, demonstrations and picketing in public *fora,* chanting, and distributing literature. Petitioners also participated in at least one of four sit-ins at premises leased by respondent.[3]

The piaintiff's complaint, as amended, was based on two federal claims alleging that defendants' activities had violated the Sherman Antitrust Act, 15 U.S.C. §1, and the Racketeer

2. Protests were generally held on Wednesday, Friday and Saturday of each week from 1976 through the date suit was instituted in 1985. There were anywhere from a handful to several hundred protesters participating in the demonstrations, except that which occurred just prior to plaintiff opening its new location on Comly Road. Vehement and extensive opposition to the plaintiff abortion clinic opening a new office in Northeast Philadelphia drew approximately 4,000 people to a demonstration at the plaintiff clinic in May, 1986. While the demonstrations were generally peaceful, tensions were still running high at the demonstration held on June 21, 1986. Several hundred pro-abortion demonstrators surrounded the abortion clinic, linking arms while scores of pro-abortion advocates surrounded patients to prevent prolife demonstrators from approaching the patients. There was pushing and shoving as would be expected in such a situation and a small number of demonstrators attempted to stop women from entering the clinic. This demonstration was depicted in the videotape shown to the jury over petitioners' objections. The district court only later ruled that the jury could not consider in its deliberations any evidence other than the four sit-ins in which petitioners had participated on one or more occasions in determining if there had been a Hobbs Act extortion. (Pet. App. 94)

3. The sit-ins occurred on December 8, 1984, August 10, 1985, October 19, 1985 and May 23, 1986 at respondent's 9600 Roosevelt Blvd. location where it provided abortions commencing in 1977. Plaintiff currently leases offices at Comly Road, Philadelphia where it has been providing abortions since June, 1986. Respondent alleged that on each occasion, prolife protesters entered the building in which plaintiff leased office space and refused to leave until arrested by police. It was also alleged that certain of petitioners attempted to persuade women in the waiting area not to have abortions during the sit-ins. Plaintiff claimed a total of $887 in property damages to suction aspirator devices which it alleged were dismantled by some unidentified party during the sit-in on August 10,1985. This incident was the only one in which the plaintiff alleged any resultant property damage.

Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c), (hereinafter "RICO") and seven pendent state claims: trespass, intentional interference with contractual relations, intentional infliction of emotional distress, assault, battery, libel and slander. (Pet. App. 143-160). The only pendent state claims ultimately considered by the jury were trespass and intentional interference with contractual relations.[4] At the close of plaintiff's case, the district court directed the verdict on plaintiff's anti-trust cause of action for failure to state a prima facie claim on the grounds, *inter alia,* that plaintiff had deleted from its prayer for relief any claim based on lost revenues, had introduced no statistics indicating a fall in either gross income or net profits, and put on no witnessses to testify as to lost good will or customer confidence, and had testified that no woman was prevented from obtaining an abortion from plaintiff as a result of petitioners' activities. (Pet. App. 82). Thus there was no evidence of any injury to the business conducted by the plaintiff corporation.

Plaintiff's allegation of a RICO "enterprise" was that "defendants have, in association with each other and with others, formed an enterprise or series of associated enterprises, including the 'Pro-Life Non-Violent Action Project of Southeastern Pennsylvania,' 'The Pro-Life Coalition of Southeast Pennsylvania,' and 'Save Our Unborn Lives' " through which they were alleged to have "agreed among themselves and with others to organize, plan and take actions designed to disrupt, harrass and otherwise harm plaintiff's business and property, unless plaintiff ceases to provide abortion services to women." (Pet. App. 143-160). Upon disposal of all pre-trial motions, the plaintiff's RICO claims were characterized by the district court

4. Plaintiff withdrew its claims for libel and slander after petitioners indicated that they would take an immediate interlocutory appeal of the district court's ruling that truth is not a defense to libel and slander if the facts which defendants seek to prove in establishing truth are inconsistent with the United States Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973). Defendants were granted summary judgment on plaintiff's pendent state claims of assault, battery and intentional infliction of mental distress.

as alleging four RICO "predicate acts": (1) "robbery" of medical equipment during a sit-in on August 10, 1985; (2) conspiracy to extort the plaintiff's intangible right to continue its abortion business free of wrongfully imposed outside pressure; (3) conspiracy to extort from the plaintiff's patients their property interest in entering into a contractual arrangement with the plaintiff; and (4) conspiracy to extort from the plaintiff's employees their property interest in continuing employment at the plaintiff abortion clinic. (Pet. App. 87-88).

Over petitioners' repeated objections that the plaintiff had no standing to obtain relief under 18 U.S.C. §1964(c) for alleged extortions of its patients and its employees, (Pet. App. 88-90), the district court ruled that even though property interests of employees and patients cannot be said to have been "extorted" from the plaintiff, the jury could consider extortion of the plaintiff's employees and patients as the predicate acts necessary to establish a pattern of racketeering activity. (Pet. App. 90). The district court acknowledged that the issue raised a question of first impression, (Pet. App. 88), and cited no relevant precedent for its decision that a pattern of racketeering activity had been established and that plaintiff had standing. The Third Circuit affirmed, without citation of any precedent. (Pet. App. 16).

The plaintiff's evidence in support of its claim that petitioners committed Hobbs Act extortions consisted of videotapes of demonstrations outside the abortion facility and the May 23, 1986 sit-in, testimony concerning the four sit-ins and testimony concerning residential picketing at the home of some of plaintiff's employees. The videotape, which was introduced into evidence and viewed by the jury over the petitioners' objections, had been distilled from over 200 hours of video showing protests at the plaintiff clinic. It depicted persons other than defendants engaging in acts of the type which plaintiff alleged had instilled in its employees and its patients the fearful state of mind necessary to prove extortion.

The court submitted plaintiff's RICO claim to the jury only with respect to those defendants who had on at least one

occasion participated in a sit-in,[5] on the basis that all of the other activities in which petitioners had engaged were protected by the First Amendment and could not form the basis for civil RICO liability. (Pet. App. 90). Four defendants who had engaged extensively in protest activities at the plaintiff clinic, but were found not to have participated in any of the four sit-ins were dismissed from the case as to all claims, including RICO, regardless of whether they had participated in other of the activities which plaintiff claimed had comprised Hobbs Act extortion. Thus, the gravaman of plaintiff's RICO claim was simply an action for trespass.

Over the petitioners' objections that the evidence presented by plaintiff did not show that petitioners or any related third party had attempted to obtain or obtained any tangible or intangible property as required by the Hobbs Act, the district court refused a directed verdict on plaintiff's Hobbs Act extortion claim, (Pet. App. 97, and instructed the jury that it could base RICO liability on conspiracy to conspire or conspiracy to attempt a Hobbs Act extortion of the plaintiff's intangible right to engage in the abortion business (and of the patients' and employees' intangible rights) by participating in sit-ins at the plaintiff clinic.

The jury found that there had been no robbery and that *petitioners had not extorted from the plaintiff's patients their right to obtain abortion or other services at the plaintiff clinic.* The jury also found that three of the remaining defendants had intentionally interfered with plaintiff's employee contracts, but awarded no damages, since it found that the plaintiff had sustained no proximate loss as a result.[6]

5. No evidence was introduced that either Patricia Walton or Linda Corbett had participated in a sit-in, however the RICO claim (but not the trespass claim) against them was allowed to go to the jury based on evidence that they had both barricaded an entrance to the plaintiff clinic, and that Ms. Corbett had stood in plaintiff's driveway in the path of a physician's car.

6. Despite the importance of these findings to an analysis of both the constitutional questions raised by defendants and issues raised with respect to application of RICO and the Hobbs Act, neither of these findings was mentioned in the Third Circuit's summary of the jury's findings or elsewhere in its opinion upholding civil RICO liability. (Pet. App. 11-17).

The jury found that the remaining defendants had, by engaging in sit-ins or blocking entrances, violated RICO by committing two predicate acts consisting of (1) Hobbs Act extortion of the plaintiff corporation; and (2) Hobbs Act extortion of the plaintiff's employees.[7] The jury awarded civil RICO damages in the amount of $887 attributable to damage which the plaintiff alleged was done to its medical equipment by some unidentified person(s) during the sit-in which occurred on August 10, 1985. There was subsequently an award of over $65,000 in attorneys fees entered against defendants in connection with the finding of $887 in RICO liability. The jury also awarded $42,087.95 in trespass damages based upon plaintiff's purchase of a security system and the hiring of guards, 72% of which were expenditures made at a location different from that at which the four sit-ins occurred and a portion of the remainder of which was expended at a time prior to the first of the four sit-ins.

The Third Circuit panel affirmed the trial court's holding that evidence of petitioners' participation in one or more sit-ins was sufficient to permit a finding of Hobbs Act extortion of the plaintiff and its employees, and affirmed imposition of civil RICO liability based upon the jury's finding that plaintiff's suction aspirator devices had been dismantled by some unidentified party during the August 10, 1985 sit-in. (Pet. App. 11-17).

REASONS FOR GRANTING THE WRIT

The courts below have engaged in an unprecedented and dangerous expansion of the scope of both the Hobbs Act, 18 U.S.C. §1951, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.*, thereby federalizing all manner of state law claims which heretofore governed resolution of disputes arising from a vast array of political

7. Those defendants who had participated in only one sit-in, and those who had only blocked an entrance were found liable under RICO for conspiracy pursuant to 18 U.S.C. §1962(d).

demonstrations.[8] The Third Circuit's decision has been widely recognized as having an enormous potential for chilling exercise of important First Amendment freedoms[9] and cannot be reconciled with this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981), as it permits the imposition of civil RICO liability upon those engaging in political dissent irrespective of the extent to which they have attempted to achieve their political objectives through exercise of their First Amendment freedoms of free speech, assembly, petition and association, and regardless of whether the damages assessed for their sporadic "unlawful" activity were directly and proximately caused by their unlawful acts.

The instant case, rather than being an isolated instance of bludgeoning protestors with a statute designed to aid in the prosecution of organized crime's infiltration of legitimate businesses, (or under this Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), to obtain damages for commercial fraud or securities violations), has already paved the way for use of RICO against protestors in Brookline, Massachusetts, Philadelphia, Pittsburgh, Chicago and other cities throughout the nation.[10] Further, the dangers inherent in

8. See A. Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators are Racketeers?*, 56 UMKC L. Rev. 287, 309-312 (1988).

9. *See, e.g., Protesters Fear More Racketeering Lawsuits*, The Pittsburgh Press, May 7, 1989, at 24, col. 1 (noting that some prolife organizations have been included as defendants in RICO suits for simply having engaged in pure speech activities such as using their hotline to provide information regarding the occurrence of demonstrations); N. Hentoff, *The RICO Dragnet*, The Washington Post, May 13, 1989, at A-19, col. 1; *Won't Somebody Stop This Runaway RICO Law*?, Newsday, March 12, 1989, at 14, col. 1; *Mario Cuomo, Racketeer*? The Wall Street Journal, March 9, 1989, at A16, col. 1; *Cf.* A. Califa, Legislative Counsel, American Civil Liberties Union, *ACLU: RICO Chilling Effect 'Enormous'*, Nat'l Law J., June 5, 1989, at 72, col. 2.

10. *See, e.g., Town of Brookline, Massachusetts v. Operation Rescue, Inc.*, No. 89-0805-T (D. Mass. filed April 13, 1989) (suit by municipality under, *inter alia*, RICO, 18 U.S.C. 1962, and the Hobbs Act, 18 U.S.C. 1951, against prolife protesters to recover the costs incurred by the municipality to arrest protesters who participated in sit-ins at Brookline abortion clinics); *Allegheny Women's Center v. Operation Rescue*, No. 89-0792 (W.D. Pa. Filed April 10, 1989)(alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constituted Hobbs Act extortion); *Roe v. Operation Rescue*, No. 88-5157 (E.D. Pa. filed June 29, 1988); *National Organization for Women v. Scheidler*, No. 86 C 7888 (N.D., Ill., filed February 2, 1986) (alleging violation of RICO as a result of defendants' alleged conpiracy to steal the bodies of aborted babies from garbage disposals in the Chicago area and transport them across state lines for burial); *North Highland Building Corp. v. Operation Rescue*, No. 88- 2121 (W.D. Pa. filed September 30, 1988)(suit by owner of building which leases space to abortion clinic alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constituted Hobbs Act extortion).

the Third Circuit's disregard of the limitations on damage awards set forth in *Claiborne* extend far beyond application of RICO. Once the First Amendment protections carefully crafted by this Court in *Claiborne* are disregarded by the lower federal courts, any federal statute, such as the Sherman Act, or garden variety state law claims for trespass[11] or nuisance may be used to squelch dissent on a broad range of public issues by allowing recovery of damages from demonstrators in amounts far in excess of those directly attributable to their unlawful conduct.

Implicit in the Third Circuit's holding is the understanding that the doors to the Federal courthouse are now open for redress of all manner of grievances held by those whose policies or business practices demonstrators seek to change. Given the fact that a Federal cause of action under RICO holds out the possibility of recovery of treble damages, attorneys fees and costs not available in state court and the fact that there have been approximately 30,000 arrests of prolife demonstrators in 380 protests during the last year[12] alone, the Federal courts are likely to see a rapid, astronomical increase in the number of civil damage actions under RICO, none of which would have

11. This is illustrated by the lower courts in this case having permitted imposition of trespass damages in excess of $42,000, not for any damage caused by petitioners at the site of their sit-ins, but for items such as the hiring of guards and installation of a security system in a new location purchased by affiliates of the plaintiff clinic after non-renewal of the clinic's lease at the end of its term.

12. *Connecticut Abortion Protesters Clog Jails*, New York Times, June 21, 1989 at B-1, col. 1.

been possible absent the Third Circuit's novel interpretations of RICO and the Hobbs Act.[13] This result, rather than being dictated by the language of the statute and a reading of Congressional intent in enacting RICO and the Hobbs Act, is contrary to plain language of the statutes and their legislative history.

Heretofore, RICO has been utilized, in both its criminal and civil applications, to root out and disable schemes by which groups, either legitimate or illegitimate in nature, have sought to gain some economic control or advantage over another by unlawful means. The Third Circuit's decision to permit imposition of civil RICO liability upon protesters whose activities were devoid of any profit-making element or potential ignores Congress' plainly stated intent that RICO apply to crime which is adapted to commercial exploitation,[14] thereby extending RICO's grasp beyond protection of economic affairs into the nation's political arena.

Further, the only decisions which have addressed this issue have held that RICO liability cannot be imposed where neither the enterprise, nor the pattern of racketeering activity contain any profit-making elements. *United States v. Flynn,* 852 F.2d 1045, 1052 (8th Cir. 1988) *cert. denied,* 109 S.Ct. 511 (1988); *United States v. Ferguson,* 758 F.2d 843 (2d Cir. 1985) *cert. denied,* 474 U.S. 102 (1985); *United States v. Bagaric,* 706 F.2d 42 (2d Cir. 1983) *cert. denied,* 464 U.S. 840 (1983); *United States v. Ivic,* 700 F.2d 51 (2d Cir. 1983). Thus, this decision creates a sharp conflict with the Second and Eighth Circuits which previously provided uniform guidance on the matter and

13. Standard RICO complaints are circulated by groups such as the National Abortion Federation, a trade organization for the abortion industry. *Going To Court Against Anti-Abortion Action: A Model Pleading Book,* Nat'l Abortion Fed. (1987). *See also Preserving the Right to Choose: How To Deal With Disruption at an Abortion Clinic,* Chapter 6, ACLU (1987) (providing instruction on the filing of RICO suits against prolife protesters).

14. *See, e.g.*, 116 Cong. Rec. 18940 (1970); 116 Cong. Rec. 18941 (1970). *See also The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties*? 46 Notre Dame Law. 55, 161-62 (1970).

produces a result which is not in keeping with Congress' intent as evidenced by RICO's legislative history.

Finally, the decision below rests upon an unprecedented interpretation of the Hobbs Act, 18 U.S.C. §1951 in which, contrary to the plain language of the statute, a defendant is guilty of attempted extortion even where he has appropriated no tangible or intangible property to himself or to a related third party. Under the Third Circuit's interpretation of the Hobbs Act, any group of persons attempting to influence the policies or business practices of a corporation, government agency or other organization or group of persons by means which include a sit-in (traditionally the most common form of civil disobedience) are (and were in this case) deemed to have engaged in Hobbs Act extortion.

Had the very same conduct as was engaged in by petitioners been undertaken to create general mayhem rather than to persuade moderation or cessation of a particular policy or business activity, the courts below would have such conduct remedied by a claim for violation of state laws prohibiting trespass or nuisance, rather than by imposition of civil RICO liability based upon a Hobbs Act extortion. Thus, it is the *nexus* between petitioners' exercise of their First Amendment rights of free speech, petition, assembly and association and their sporadic unlawful acts, rather than the unlawful conduct itself, that converts an action for civil damages for trespass into a Hobbs Act extortion.

Under the Third Circuit's interpretations of RICO and the Hobbs Act, Martin Luther King was a racketeer when he trespassed upon private property and conspired with others in an attempt to change the business policies of owners of segregated lunch counters. So too is anyone participating in a sit-in against apartheid with the goal of changing the investment policies of a university. Indeed, once the lynchpin of economic purpose is removed from RICO and the Hobbs Act, RICO applies to all social protests. The American Civil Liberties Union feared just such a use of RICO when the statute was first proposed, and its fears regarding how the statute might be used in cases of civil disobedience have come to fruition in the Third

Circuit's unwarranted and dangerous interpretation of the scope of RICO.[15]

I. The decision below cannot be reconciled with this Court's decision in *NAACP v. Claiborne Hardware Co.* in that it imposed upon demonstrators engaged in a prolonged struggle to bring about political and social change by exercise of First Amendment rights of free speech, assembly, petition, and association, damages far in excess of those directly and proximately caused by the protesters' sporadic unlawful conduct.

For a period of over nine years petitioners and thousands of others protested plaintiff's business of performing first and second trimester abortions by organizing marches and demonstrations, and engaging in picketing and chanting, including on occasion use of a bullhorn. The petitioners also distributed literature to persons walking into the clinic, and approached women to engage in what petitioners refer to as "sidewalk counseling," during which they would offer information regarding fetal development and financial and other assistance in an attempt to persuade women entering the abortion clinic to carry their babies to term. As was evidenced by the testimony of two women who visited the plaintiff abortion clinic to obtain services on the days on which such protests occurred, the information and assistance offered by the protesters sometimes resulted in women foregoing abortions.[16] Demonstrations outside the clinic occurred with regularity for many years, generally being held on Wednesday, Friday and Saturday of each week. While many of the demonstrations included anywhere from a handful to several hundred protesters, opposition to the plaintiff abortion clinic relocating to a new location in Northeast Philadelphia brought approximately 4,000 protesters to the clinic on June 21, 1985.

This Court has "'recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values'". *Claiborne,* 458 U.S. at 913 (quoting *Carey v. Brown,* 447 U.S. 455, 467 (1980)).[17] The debate raging across this nation concerning abortion on demand is just such a "public issue" as this Court recognized in its recent ruling on an anti-picketing ordinance designed to prohibit residential picketing of abortionists' homes by prolife protesters when it observed that the ordinance operated "at the core of the First Amendment by prohibiting [protesters] from engaging in picketing on an issue of public concern." *Frisby v. Schultz,* 108 S.Ct. 2503 (1988).[18] In holding that evidence of participation by petitioners in one or more of four sit-ins was sufficient to prove a conspiracy to commit Hobbs Act extortion, the Third Circuit ignored this Court's warning that "[a] massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 933 (1981).[19] Further, despite the

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15. That the RICO claim in the instant case was filed with the intent of suppressing dissent was clearly stated by Edmond Tiryak, Esq., in a convention speech in which he stated that he chose RICO to use against the right-to-lifers because it was so oppressive and impossible to defend. He claimed success at pointing out to "fringe types of people" the perils of following the leadership. Address of E. Tiryak, counsel to Northeast Women Center, Inc., N.O.W. convention (7/14/89) filed as Exhibit "C" to affidavit of Joseph Scheidler in support of defendants' motion for entry of Permanent Protection Order, *N.O.W. v. Scheidler,* No. 86C-7888 (N.D. Ill. filed 1986) at 1-8. The entire transcript of Mr. Tiryak's speech as filed in *N.O.W. v. Scheidler* is attached as Petitions Appendix B.

16. *See* Testimony of Linda Dombrowski and Ninfa Montalvo.

17. *See also Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) (stating that "speech concerning public affairs is more than self-expression; it is the essence of self-government") and *New York Times v. Sullivan,* 376 U.S. 254, 269-70 (1964).

18. *See also Bowen v. Kendrick,* 108 S.Ct. 2562 (1988), *Roe v. Abortion Abolition Society,* 811 F.2d 931 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 145 (1987).

19. In *Claiborne,* a local chapter of the NAACP organized a boycott of white merchants and enforced the boycott by several means, including a number of acts of violence directed primarily against blacks not honoring the boycott, such as the firing of gunshots into their homes (on at least three occasions), slashing of tires, throwing a brick through a windshield of a car,

overwhelming evidence that the prolife protests engaged in by petitioners for over nine years prior to the plaintiff instituting suit in this case had been dominated by the exercise of First Amendment freedoms of speech, petition, assembly, and petition, the Third Circuit held that a minor amount of property damage occuring at one of the sit-ins in which 12 of the 27 petitioners herein participated was a cognizable RICO injury, resulting in a recovery of treble damages, costs, and an attorneys' fee award equal to 73 times the amount of property damage alleged found to have been caused by petitioners. The petitioners were also labeled "racketeers" which has been recognized by this Court as carrying with it an inevitable stigma.[20] In addition, over $42,000 in damages attributable primarily to the plaintiff's purchase of a security system and the hiring of guards at its new business location was awarded despite the fact that the four sit-ins which formed the basis for a finding of Hobbs Act extortion occurred at a separate location. Even if the sit-ins had occurred at the same location at which the expenditures were made, they cannot be characterized as the direct and proximate result of the sit-ins as required by *Claiborne*, otherwise every increased cost of a business which prompts protests from some citizens could be recovered from the protesters, and the carefully crafted principles designed by this Court to prevent a chilling of First Amendment freedoms would be rendered meaningless.[21]

NOTES *(Continued)*

stealing whiskey purchased from a white merchant, placing threatening phone calls. *Claiborne*, 458 U.S. at _____ - _____.

20. *Sedima v. S.P.R.L. Imrex Company, Inc.*, 741 F.2d 482 (2d Cir. 1984) *rev'd on other grounds,* _____ U.S. _____ (1985).The stigma associated with a charge of "racketeering," whether in the context of a criminal or civil proceeding, is great and may in itself deter participation in protected First Amendment activities for fear of being labeled a racketeer. *See United States v. Guilano*, 644 F.2d 85, 89 (2d Cir. 1981) (charge of racketeering itself may prejudice the jury).

21. The danger of this aspect of the decision below cannot be overemphasized, and is very real, as evidenced by the RICO suit filed recently against prolife organizations and inviduals by the Town of Brookline, Massachusetts in which it seeks to recover the costs associated with

That the constitutional protections set forth in *Claiborne* apply in the case at bar is apparent upon an examination of the facts of this case: (1) it is beyond dispute that the petitioners were participating in a prolonged struggle to bring about social and political change, and that much of their activity in protesting abortion on demand consisted of demonstrations, picketing, leafletting, sidewalk counseling and the like which the district court conceded was protected First Amendment activity; (2) the "violent acts" identified with the petitioners' participation in the political protests could hardly be characterized as pervasive in the context of nine years of protests at the plaintiff clinic, and they did not remotely approach the level of violence which occurred in *Claiborne;* and (3) the damages awarded did not flow directly and proximately from the petitioners' actions. The Third Circuit's decision cannot be reconciled with this Court's holding that, despite boycott leaders' intent in that case to harm the merchants economically, leaders of and participants in a boycott of white merchants could not be held jointly and severally liable for the merchants' lost earnings based on evidence that fear of reprisal had caused some black citizens to withhold their patronage:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurred in the context of constitutionallly protected activity, however, 'precision of regulation' is demanded. *NAACP v. Button,* 371 U.S. 415, 438 (1963). Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Claiborne, 458 U.S. at 916 (footnote omitted). "Precision of

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arresting participants in a peaceful sit-in. The enormous chilling effect of such actions, especially in light of the Third Circuit's decision in this case, is obvious. Such an action by a governmental subdivision also poses the very grave danger that damage suits will be selectively pursued against only those with whom the leadership of the governmental subdivision disagree.

regulation," this Court said, demanded that damages be awarded only to the extent that losses were directly and proximately caused by any unlawful conduct. *Id*. at 918, 921.

The constitutional principles established by this Court in *Claiborne* also placed severe restraints upon the imposition of damages on a conspiracy theory, holding that for liability to be imposed **it is necessary to establish that the group itself and each individual upon whom damages are to be imposed held a specific intent to further illegal aims or to commit the violent act which resulted in the damage.** *Id.* at 919-20. In this case, the RICO injury found by the jury was based solely upon testimony to the effect that the suction aspirator devices had been checked on the morning of August 10, 1985 by employees of the clinic and were in working order, and that they were dismantled when the sit-in in was over. There was no testimony that any particular person, let alone any of the petitioners had dismantled the equipment, and the jury did not make any finding as to who damaged the equipment. As no perpetrator was named, and as only 12 of the petitioners participated in the sit-in which is alleged to have caused the RICO injury, RICO liability cannot, under *Claiborne,* be imposed upon the petitioners because this Court has held that the standards for imposing such liability on what is essentially a conspiracy theory

> must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy.

Claiborne, 458 U.S. at 933-34. That burden has not been met in this case.

The plaintiff had available to it civil remedies under State law which would have compensated it for those direct injuries. Petitioners do not argue that plaintiff is not entitled to recover damages for nuisance, civil trespass, or destruction of property

to the extent the same are proven and flow directly from any activities engaged in by the petitioners which are not protected by the First Amendment. The result reached by the Third Circuit, however, clearly does not provide the "precision of regulation" demanded by the First Amendment. *Claiborne,* 458 U.S. at 921.

II. The decision below creates a conflict with the Second and Eighth Circuit decisions holding that RICO liability may not be imposed where neither the enterprise nor the pattern of racketeering activity had any profit-making element, and is directly contrary to the legislative history of RICO

Although the dearth of case law on this issue is testimony to how infrequently RICO liability has been sought for non-economically motivated activities, this issue has arisen before. In *United States v. Ivic,* 700 F. 2d 51 (2d Cir. 1983), the Second Circuit held that a RICO conviction could not be sustained upon evidence that the defendants engaged in the underlying predicate acts merely to advance their political beliefs, but without seeking any economic control or advantage from their acts. The defendants in *Ivic* were four Croatian nationalists advocating separation of Croatia from Yugoslavia, who were prosecuted under RICO, 18 U.S.C.1962(d), for conspiracy to violate the provisions of Section 1962(c) of the RICO statute. The predicate acts underlying the RICO prosecution included the attempted murder of a perceived political opponent, as well as conspiracies to bomb a travel agency that specialized in travel to Yugoslavia. The indictment charged that defendants "conspired to engage in various criminal activities including acts and threats involving murder and arson as chargeable under the laws of the State of New York". *Ivic* at 58. The indictment charged further, and the evidence demonstrated, that " '[i]t was the primary object of this criminal enterprise' that the defendants 'would and did use terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs.' " *Id.*

The Second Circuit held that the RICO conviction could not be sustained on grounds that "the conduct charged in the indictment and proved at trial did not consitute an offense under §1962(d) [of the RICO statute] because, as the Government conceded at argument, it was neither claimed nor shown to have any mercenary motive." Id. at 59 & n.5.[22]

In reaching its decision, the *Ivic* court conducted an exhaustive analysis of both the language and the legislative history of the RICO statute, and found that, applying the Section 1961 definition of "enterprise" to Section 1962(c) as read in conjunction with Section 1962(a) and (b), the word "enterprise" clearly contemplated "an organized profit-seeking venture." *Id.* at 60. Because defendants' venture was devoid of any such profit-making activities, and was, rather, designed to promote their political ends, the court concluded that it could not be an "enterprise" within the meaning of the RICO statute. The court found that the statement of purpose prefacing the statute, as well as the very meaning of the word "racketeering," provided further evidence of the statute's economic thrust.[23] The *Ivic*

22. Indeed, the Court found that for this reason, the indictment itself had failed to charge an offense under the statute, and that consequently the convictions constituted "plain error" permitting the court to rule on the issue even though neither party had raised it either at trial or on appeal. *Id.* at 59 n.5.

It was neither alleged nor argued that petitioners had engaged in abortion protests in order to obtain money or to achieve any other mercenary goal. Indeed, plaintiff maintained throughout the trial that petitioners' protest arose solely out of their opposition to abortion.

23. The court also noted that its interpretation of the statute was in line with the Justice Department's own guidelines on RICO prosecutions, which it cited as illustrative of the Department's own understanding of the statute. Those guidelines provided that:

> [N]o RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic* goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

Ivic at 64. (emphasis supplied by the court) (citing Memorandum of

court's holding was further supported by its analysis of RICO's legislative history, from which the court concluded that Congress designed RICO to thwart organizations that obtain economic gain or advantage through unlawful means:

> Other statements by the sponsors of RICO indicate its inapplicability to crimes having no economic motivation. Senator McClellan, the principal sponsor of the Organized Crime Control Act of 1970, made clear on several occasions that the purpose of Title IX is "economic" and that the only crimes included in [Section] 1961(1) are those adapted to "commercial exploitation." [Citations omitted.] Responding to objections of the Association of the Bar of the City of New York and the ACLU that the list of predicate racketeering acts in [Section] 1961(1) included offenses often committed by persons not involved in organized crime, Senator McClellan stated: "It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected . . . . The danger that commmission of such offenses by other individuals would submit them to proceedings under Title IX is even smaller than any such danger under Title III of the 1968 [Safe Streets] Act, since commission of a crime listed under Title IX provides only one element of Title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under Title IX.

Id. at 63-64. (emphasis supplied by the court.) [emphasis must be inserted] Thus, while it is clear from RICO's legislative history that its drafters' intent was to recognize and leave open the possibility that the statute, which was directed primarily

Philip Heymann, Assistant Attorney General, Criminal Division (January 16, 1981)).

against organized crime could be used against legitimate businesses and groups (an understanding that this Court confirmed in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985)), it is also clear that the drafters of the statute considered the use of a pattern of Section 1961 crimes to gain an economic advantage the *sine qua non* of a RICO violation, without which one could not be subject to liability under any section of the statute.[24]

In *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) the Eighth Circuit stated that "for purposes of RICO, an enterprise must be directed toward an economic goal," and

24. That either the enterprise or an alleged pattern of racketeering activities be used primarily to gain an economic advantage was reiterated by the Second Circuit in *United States v. Bagaric*, 706 F.2d 24 (2d Cir. 1983) and *United States v. Ferguson*, 758 F.2d 843 (2d Cir. 1985). *Bagaric* and *Ferguson*, were two cases related to *Ivic*, in which the Second Circuit upheld the RICO convictions of defendants, also Croation nationalists, for engaging in terrorist activities to further their political beliefs. But these cases were critically different from *Ivic* and from the instant case in that the defendants were alleged and proven to have used their predicate acts, involving murder, attempted murder and robbery, to obtain money to support their political and terrorist operation:

> In *Ivic*, we expressly stated that we were not addressing a situation in which a terrorist organization engaged in robberies to obtain money to further their activities. 700 F.2d at 61 n.6. **Here, the defendants' activities centered around the commission of economic crimes.** These defendants were charged with ten robberies and attempted robberies of armored trucks, the murders of guards and police officers at the scene of those crimes **and the use of the money obtained from those robberies to support enterprise members** and to maintain safe houses.

Ferguson, 758 F.2d at 853 (emphasis added). The activities of petitioners in this case stand in stark contrast to those engaged in by the defendants in *Ferguson* as none of the activities in which they engaged could have, nor did they, place one thin dime in the pockets of the petitioners. In *Bagaric*, in which defendants were shown to have carried out a scheme to extort money from the victims of their crimes to support their activities and to murder those extortion targets who refused to pay. Thus, as was the case in *Ferguson*, the defendants in Bagaric were shown to have used the activities defined in Section 1961 of the RICO statute to obtain money from the very victims of those crimes — i.e. the targets of their extortion.

found a sufficient economic purpose in the enterprise's objective of controlling St. Louis labor unions. The Third Circuit's opinion is devoid of any discussion or analysis of the legislative history of the statute and makes no attempt to distinguish the instant case from decisions of the Second and and Eighth Circuits.

The Third Circuit's statement that "[petitioners] argue that because their actions were motivated by their political beliefs, civil RICO is inapplicable," (Pet. App. _____), is incorrect. Rather than claiming any special exemption from application of RICO on the basis of the motivations behind their protest activities, petitioners argument is that those of petitioners' activities which are alleged to justify imposition of civil RICO liability did not in fact and could not have resulted in them appropriating to themselves or any third party any economic benefit or advantage. *United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983), the only case relied upon by the Third Circuit in its decision to extend RICO to acts of civil disobedience is inapposite, as it involved a RICO prosecution of a group of defendants who committed a series of robberies in order to finance a religious organization. Thus, rather than supporting the Third Circuit's decision, *Dickens* simply provides one more example of a case in which the defendants' racketeering activity was used to finance their enterprise and is consistent with the Second and Eighth Circuit decisions.

This Court's decision in *Sedima* does nothing to weaken the Second and Eighth Circuit's interpretation of the statute or its assessment of the legislative history of RICO. In fact, it continues the tradition of applying RICO to crimes having an economic dimension, and because the activity charged was classically economic in nature, the issue that was before the court in Ivic did not even arise.[25] Further, in *dicta*, this Court gave support to the Second Circuit's view that commission of

25. This Court in *Sedima* dealt only with the nature of the injury suffered by the plaintiff, and did not touch on the nature of the acts by defendant required to impose liability under the statute.

the requisite number of predicate acts is not all that RICO requires: "[i]f the defendant engages in a pattern of racketeering activity **in a manner forbidden by these provisions,** and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under Section 1964(c)." *Id.* at 495 (emphasis added).

The Third Circuit's decision is contrary to the clear requirement established in both RICO's legislative history and in the Second and Eighth Circuit decisions holding either the enterprise or the racketeering activity have an economic or profit-making purpose and should be reversed by this Court.

III. The decison below to permit a RICO violation based upon predicate acts to others creates a sharp split in the Circuits and conflicts with *Sedima* as to both standing and "pattern of racketeering activity"

Plaintiff abortion clinic lacked standing to allege the extortion of its employees as a predicate offense where it suffered no proximate damage from such activity. Plaintiff also failed to establish a "pattern of racketeering activity" as the only compensable injury to plaintiff was caused by a single predicate offense.

The jury found that petitioners had committed two predicate offenses: (a) a conspiracy to extort the clinic's intangible right to continue its abortion business free from wrongfully imposed outside pressure; and (b) a conspiracy to extort from the clinic's employees their property interest in continuing employment at the clinic. The jury also found that the only harm caused by these predicate acts was the $887.00 damage to suction aspirator devices which the plaintiff alleged had occurred during the August 10, 1985 sit-in.

The Third Circuit's opinion reinforces its previous decision in *Town of Kearny v. Hudson Meadows Urban Renewal,* 829 F.2d 1263, 1268 (3d Cir. 1987) which holds that acts injurious to others can be considered predicate acts. In accord, *see Marshall & Ilsley Trust Co. v. Pate,* 819 F.2d 806, 809 (7th Cir. 1987). This clearly conflicts with *Yellow Bus Lines, Inc. v.*

Union Local 639, 839 F.2d 782, 790 (D.C.Cir. 1988), *cert. denied* 109 S. Ct. 309 (1988), which held that only the pattern of labor violence directed against plaintiff Yellow Bus Lines, and not others, could be considered in the "pattern of racketeering activity." The lower courts are also split on this issue. *Bender v. Continental Towers, Ltd. Partnership,* 632 F. Supp. 497, 502 (S.D.N.Y. 1986) (injuries to others cannot be considered to establish pattern of racketeering activity); *Pandick, Inc. v. Rooney,* 632 F. Supp. 1430, 1433 (N.D.Ill. 1986) (injuries to others may not be considered in determining pattern). Under this Court's holding in *Sedima,* the plaintiff has standing only if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. *Sedima,* 473 U.S. at 495. The jury found that the only RICO injury suffered by plaintiff was $887 in property damage during one sit-in and found that neither the employees nor the clinic had sustained any cognizable injury as a result of the extortion of its employees. A defendant who engages in racketeering activity is not liable to those who have not been injured. *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384 (7th Cir. 1984) *aff'd* 473 U.S. 606 (1985). Obviously, as petitioners caused no injury to the employees of the clinic by the "extortion" of their right to continued employment, they also caused no injury to the plaintiff. This Court has acknowledged that while two acts of racketeering activity are necessary for a RICO violation, they may not be sufficient. *Sedima,* 473 U.S. at 497 n. 14. Plaintiff failed to establish the requisite RICO "pattern of racketeering activity" because neither the clinic nor the employees suffered harm as a result of one of the two predicate acts upon which the jury based its verdict.

IV. The decision below is an unwarranted and unprecedented expansion of the scope of the Hobbs Act, 18 U.S.C. §1951, is contrary to the plain language of the statute, undercuts the legislative history of the statute, and federalizes as Hobbs Act extortions all forms of political protest which involve sit-ins or trespass.

The courts below have engaged in a novel and unwarranted expansion of the scope of the Hobbs Act, by holding that it applies to activities which by the plain meaning of the statute are not indictable as Hobbs Act extortion. The Hobbs Act defines "extortion" as **"the obtaining of property from another,** with his consent, induced by wrongful use of actual or threatened force, violence, fear or under color of official right." 18 U.S.C. §1951(b)(2) (emphasis added). Black's Law Dictionary (5th Ed. 1979) defines "obtain" as follows: "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way". Thus, the plain meaning of the statute could not be more obvious – the "obtain property" element of a Hobbs Act extortion is met if the defendant (or a related third party at defendant's direction), acquires, or attempts to acquire property as a result of threatened force, violence or fear.

The Hobb's Act definition of extortion is derived from the criminal code of New York. *United States v. Furey,* 491 F.Supp. 1048 (E.D.Pa.), *aff'd*, 636 F.2d 1211 (3d Cir.1980), *cert. denied*, 451 U.S. 913 (1981). That the petitioners neither appropriated to themselves nor for any related third party the plaintiff's intangible interest in continuing to provide abortion services was apparent upon completion of the plaintiff's case, and should have resulted in a directed verdict for defendants on plaintiff's Hobbs Act extortion.[26] The district court's instructions to the jury on extortion[27] effectively wrote out of the

26. *See* petitioners' argument on this point in Pet. App.

27. The jury was instructed that "a person is guilty of extortion if he induces his victim to **part with property** through the use of fear . . . and that "[i]f you find any of the defendant [sic] entering the [plaintiff's] property without authorization or by otherwise wrongfully preventing the [plaintiff] from operating, induced or attempted to induce either the [plaintiff], its employees or its patients to part with property as a result of fear, you may find that those defendants are liable for extortion." (emphasis added)

Hobbs Act any requirement that a defendant obtain, attempt to obtain, or conspire to obtain property, substituting therefor a requirement that plaintiff "surrender" or "be deprived of" property. The courts below thus ignored the fundamental principle of statutory construction that criminal statutes must be strictly construed and that even when ambiguities exist within a statute (which is not the case with respect to Section 1951(b)(2) of the Hobbs Act), any "ambiguity concerning the ambit of criminal statutes should be resolved in factor of lenity." *Rewis v. United States,* 401 U.S. 808, 812 (1971) (citation omitted).[28] The Third Circuit's assertion that petitioners proferred no point for charge on the necessity of proving that petitioners acquire property is simply incorrect. Counsel for defendants objected to the district court's instruction on extortion specifically on that basis[29] and petitioners submitted points for charge on extortion taken from New York Standard Jury Instructions.

The Third Circuit's decision directly contradicts the plain wording of the Hobbs Act and is not supported by the decisions

28. By deleting the requirement that the petitioners "obtain property" from the plaintiff by virtue of the extortion of intangible rights, the Third Circuit conflicts with this Court's pronouncements on similar statutes. *McNally v. U.S.,* 107 S.Ct. 2873 (1987) (citizens cannot be defrauded of intangible rights pursuant to 18 U.S.C. §1341); *Dowling v. U.S.*, 473 U.S. 207 (1985) (interstate transportation of stolen property, 18 U.S.C. 2314, does not apply to transportation of copyrighted material). The origin of the Hobbs Act as well as 18 U.S.C. §§1341, 2314 is common law theft necessitating the obtaining of tangible property by the perpetrator of the extortion.

29. Counsel for petitioners interposed the following objection: "Mr. Stanton: Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third-party and that the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary."

cited in its opinion.[29] *U.S. v. Cerelli,* 603 F.2d 415 (3d Cir. 1979), involved threats to obtain monetary contributions to a political party, and in *U.S. v. Starks,* 515 F.2d 112 (3d Cir. 1975), money was extorted under the apparent guise of a religious organization. In *United States v. Anderson,* 716 F.2d 446 (7th Cir. 1983), there was evidence produced at trial that defendants had extorted $300 from their victim and had talked of nothing during the first two days in which they held him captive other than how to obtain more money. Thus, in each of the cases cited by the Third Circuit in support of its holding that property need not be obtained by the defendant, the defendant had attempted to obtain or obtained money, either for himself or for a third party to whom defendant directed that the payment be made. The cases relied on by the Third Circuit might, therefore, be more aptly cited in support of the petitioners' contention that the statute means what it says, and that Hobbs Act extortion has not heretofore been found where the defendant appropriated no property to either himself or any related third party.[30]

Rather, the Third Circuit has substituted the term "deprive another of property" or "cause another to surrender property" for the statutory language of "obtain property" in construing the Hobbs Act.

Should Congress wish to have the Hobbs Act apply to situations in which the defendant obtains no property, either tangible or intangible, and where it can only be shown that, because of a political protest, plaintiff "surrendered" or "was deprived of" its intangible right to do business free of interference by protesters, Congress can amend the statute. The serious First Amendment considerations of such a legislative

30. Neither do the cases cited by plaintiff support the Third Circuit's interpretation of the Hobbs Act. In *U.S. v. Green,* 350 U.S. 415 (1955), the defendant was a union representative who used threats to **obtain** jobs for union employees. While the extortionist himself was not benefitted, the employees receiving the jobs were. In *U.S. v. Local 560,* 780 F. 2d 267 (3d Cir. 1985), the defendants intimidated union members into giving up their statutory right to participate in union affairs, clearly benefitting the defendants by enabling them to acquire control of *Local 560.*

proposal aside, it is for Congress, not the Third Circuit Court of Appeals, to amend the criminal statute in question, and this Court should reject such an unprecedented and dangerous expansion of the statute.

V. The decision below concerning the application of Federal Rule Civil Procedure No. 51 creates a sharp split in the circuits concerning what is required to preserve error for appeal.

Before closing argument, petitioners submitted a written point for charge on trespass which contained instructions outlining the measure of damage for trespass. (Pet. App. 161-162). The district court declined to rule on this point and declined to instruct as requested. The jury ultimately awarded 42,087.95 in trespass damages.

Petitioners contended in their post-trial motions, and on appeal in the court below, that the district court charge on trespass was incomplete and misleading in that the charge did not include guidance on the correct measure of damages for trespass. Plaintiff responded to these arguments in the district court without interposing a claim of waiver. The district court ultimately rejected petitioners claim that its charge was defective (Pet. App. 67-68). Plaintiff, in the Third Circuit, again contested petitioner's challenge to the district courts charge but, for the first time, asserted that petitioners challenge was waived. The court below accepted plaintiff's untimely claim of waiver. (Pet. App. 9)[31] This holding was wrong for several reasons.

Although the district court rejected petitioners' challenge to its charge on trespass damage, the challenge was considered on the merits by the district court, and in responding to the challenge, plaintiff argued on the merits and did not claim waiver. Consequently, the lower court erred in accepting

31. The court below simply ignored petitioners' contention that the trespass damage verdict lacked a sufficient evidentiary basis. This was error as appellate review of all grounds supporting a judgment is available at the instance of the losing party. . . . *In re Trimble Co.,* 479 F.2d 103, 111 (3rd Cir. 1973).

plaintiff's untimely claim of waiver as it is plaintiff who must forego its claim of waiver by not asserting it. *See City of Newport et al. v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Under Federal Rule of Procedure No. 51, any party may file a written request that the court instruct the jury on the law as set forth in the request. Once this is done, as it was in this case, the Rule provides that the court "shall" inform counsel of its proposed action on the written request prior to counsel's arguments to the jury. Here the court failed to inform counsel of its proposed action on their written request concerning trespass under state law. The appropriate cure for the trial court's failure to comply with Rule 51 is to relieve the party aggrieved thereby of the operation of the prohibition against asserting as error the giving of or failure to give an instruction to which objection has not been made. *Swain v. Boeing Airplane Co.*, 337 F.2d 940, 942-943 (2nd Cir. 1964), *cert. denied.* 380 U.S. 951 (1965); *Swift v. Southern Railroad,* 307 F.2d 315, 320-321 (4th Cir. 1962); and *Hetzel v. Jewel Co., Inc.*, 457 F.2d 527, 536 (7th Cir. 1972).

The Third Circuit Court also erred in accepting plaintiff's claim of waiver as the district court declined to give petitioners' written point for charge on trespass[32], and as petitioners' counsel published their contentions concerning the measure of damage in their closing summations. Notwithstanding this, the district court declined to instruct as requested and advised, and under these circumstances, the petitioner's challenge to the charge on trespass was properly preserved. *See Bolley v. Stotler,* 751 F.2d 631 (3rd Cir. 1985); *Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Maryland.* 202 F.2d 794, 800-801 (7th Cir. 1953).

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32. The court below was so advised in main brief of petitioner Guerra et al. at No. 88-1336, p. 40.

CONCLUSION

Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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88-2137

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL MCMONAGLE, et al.
Petitioners

v.

NORTHEAST WOMEN'S CENTER, INC.
Respondent

PETITIONERS APPENDIX

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Appendix

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 88-1268. 88-1333. 88-1334.
88-1335 and 88-1336

NORTHEAST WOMEN'S CENTER. INC.,

Appellant in No. 88-1268

v.

MICHAEL McMONAGLE. JOSEPH P. WALL. ROLAND MARKUM. HOWARD WALTON. HENRY TENAGLIO. STEPHANIE MORELLO. ANNEMARIE BREEN. ELLEN JONES. KATHY LONG. SUSAN SILCOX. PAUL C. ARMES. WALTER G. GEIS. JOHN J. O'BRIEN. JAMES CODICHINI. PATRICIA WALTON. JOHN BREEN. DENNIS SADLER. JOAN ANDREWS. MIRIAM DWYER. MARY BYRNE. JOHN MURRAY. LINDA CORBETT. THOMAS McILHENNY. PATRICIA LUDWIG. GERRALD LYNCH. MARGARET CAPONI. DEBORAH BAKER. THOMAS HERILHY. PASQUALE VARALLO. JOHN STANTON. ANNE KNORR. JOHN CONNOR. ELLIOTT STEVENS. HARRY HAND. LAURIE WIRFELL. HELENA GAYDOS. ROBERT MORAN. EARL ESSEX. PATRICIA McNAMARA. DONNA ANDRACAVAGE. JUAN GUERRA. and LINDA HEARN

Michael McMonagle. Dennis Sadler. Mary Byrne. Deborah Baker. Margaret Caponi. Thomas Herlihy. Anne Knorr. and Robert Moran.

Appellants in No. 88-1333

John J. O'Brien. Joseph Wall. Roland Markum. Howard Walton. Patricia Walton. Henry Tenaglio.

Stephanie Morello, Annemarie Breen, Ellen Jones, Kathy Long, Susan Silcox, Paul Armes and Walter Gies,

Appellants in No. 88-1334

Patricia McNamara and Thomas McIlhenny,

Appellants in No. 88-1335

Donna Andracavage, Juan Guerra, and Helena Gaydos,

Appellants in No. 88-1336

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 85-4845)

Argued October 20, 1988

Before: SLOVITER and HUTCHINSON,
Circuit Judges, and
GERRY, *District Judge**

(Opinion filed March 2, 1989)

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* Hon. John F. Gerry, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Following a lengthy trial in this action brought by a women's health center against a group of anti-abortion activists, the jury returned a verdict for plaintiff on its claims under civil RICO and the state torts of trespass and intentional interference with contract. On appeal, plaintiff challenges the district court's use of the unclean hands doctrine to limit the injunctive relief given and the court's order setting aside the jury's punitive damage award. Defendants, who have filed multiple briefs, raise more than twenty issues on their cross-appeals, including the application of civil RICO, the availability of the justification defense, and various claims of prejudical error at trial.

Although issues on appeal are generally considered first, we begin with a discussion of the matters raised on defendants' cross-appeal because, if defendants' contentions are correct, we need not reach the appellant's issues. We will confine our opinion to those issues raised by defendants that we believe merit discussion.[1]

I.

Facts and Procedural History

Plaintiff-appellant, the Northeast Women's Center, Inc. (Center), is a Pennsylvania corporation which provides gynecological services, including pregnancy testing and abortions. The defendants-appellees are twenty-six individuals[2] (referred to collectively as Defendants) who are vigorously opposed to abortion and who have repeatedly protested the Center's abortion services by activities at the situs of the Center. Certain Defendants have attended Board of Directors meetings of the Pro-Life Coalition of Southeastern Pennsylvania and one defendant, Michael McMonagle, is its paid Executive Director.

The Center has emphasized throughout this litigation that it is not challenging Defendants' free speech right to make public their opposition to

1. We conclude that the district court committed no error of law or abuse of discretion with respect to all other issues raised by defendants. Those issues are directed in the main to the court's denial of a stay until state criminal charges then pending against defendants were resolved; its rulings on the relevance of certain videotape and witness testimony; and its rejection of defendants' argument that it was collaterally estopped from issuing injunctive relief. *See also* note 4 *infra*.

2. There were 42 individuals sued. Plaintiff ultimately dismissed its claims against 11 defendants either before or during trial. The court gave a directed verdict to four defendants, and dismissed one post-trial.

abortion. Instead. this lawsuit was brought alleging illegal and tortious activity by Defendants that went beyond Defendants' constitutional rights of speech and protest.

The Center presented evidence at trial that established that Defendants unlawfully entered the Center's facilities on four occasions. On December 8. 1984. approximately fifty protestors. including twelve Defendants. rushed into the Center's premises. which at that time were located at 9600 Roosevelt Boulevard in Northeast Philadelphia. and knocked down Center employees who attempted to prevent the mass entry into the building. Once inside. Defendants and others blocked access to rooms and strewed medical supplies on the floor.

Ardis Ryder. then acting administrator of the Center. testified that she decided on the basis of this incident to hire security guards for the first time in the Center's history to protect the safety of its employees and patients. One employee testified that she sustained injuries during this incident while attempting to prevent Defendants and others from forcing their way into a patient treatment room. She testified that as a result of such harassment she resigned from her position at the Center. and did not resume employment at the Center until after it installed a sophisticated security system. Twelve Defendants were among the thirty persons arrested and charged with trespass after this incident. App. at 633.

On August 10. 1985. twelve Defendants pushed into the Center's premises. An employee who was injured as a result of Defendants' activities lost work time. Another employee testified that after members of the group locked themselves in an operating room. she observed a Defendant leave the operating room with an object concealed under his coat. When the employee

entered the room she discovered that machinery had been damaged and disassembled. Twelve Defendants were arrested and subsequently convicted of defiant trespass for the August 1985 incident. App. at 634: *see Commonwealth v. Markum*. 373 Pa. Super. 341. 541 A.2d 347 (1988) (affirming conviction on appeal).

On October 19. 1985. there was another attempt by anti-abortion activists to enter the Center. A number of persons were arrested. including twenty-four Defendants. App. at 635. Two persons did manage to rush through the doors and enter. knocking down a Center employee. Three Defendants were subsequently convicted of defiant trespass. App. at 635-36.

The fourth trespass that was the subject of the federal suit took place on May 23. 1986. The jury was shown a videotape of the incident. which showed protesters sitting down on the floor of a waiting room inside the clinic. standing in front of patients awaiting services and castigating them. and ignoring repeated requests that they cease trespassing and leave the building. Exhibits P-76. P-77. One Defendant stated. "We're going to shut this place down." The police eventually removed the trespassers. There was testimony that other Defendants who were outside the premises blocked the doors to the Center and the building in which it was located. Twenty-six persons. including sixteen Defendants. were arrested and fifteen Defendants were subsequently convicted for criminal conspiracy. disorderly conduct. and/or defiant trespass as a result of this incident. App. at 637-38.

Witnesses at the trial in this case testified that on these and other occasions they observed Defendants photographing patients. chanting through bullhorns. blocking building entrances. and surrounding and pounding on the windows of employees' cars. In fact an assistant district attorney who witnessed a

demonstration testified that the demonstrators' activity rose to a "frenzy" and that he delayed leaving the Center out of fear for his physical safety. App. at 791-93. Videotape evidence revealed demonstrators pushing, shoving and tugging on patients as they attempted to approach the Center, knocking over and crossing beyond police barricades and blocking the ingress of cars. A protester is recorded stating, "I bet you ten to one this place doesn't last six months." Another added, "This place is going to be shut down." Exhibits P-6, P-76, P-77. A doctor employed by the Center testified that the sound of chanting, amplified by bullhorns, was audible in the Center's operating room. Another doctor testified that this noise would put patients "under considerably greater stress," especially when going under or coming out of general anesthesia. App. at 433.

Three employees testified that they were repeatedly subjected to picketing at their homes. Two of these employees stated that they resigned from their positions at the Center because of Defendants' actions at their homes and the Center.

In July 1986, the Center lost its lease and moved to a new location. Both the director of the Center and defendant McMonagle, a leader of the activists, attributed the Center's loss of its lease to Defendants' activities at the Center.[3] The Center installed a new

3. A fundraising letter signed by McMonagle, which was admitted into evidence, stated:

> Our organization is encouraging and organizing increasingly effective protests at these abortion chambers. . . . In March, 1985 we received the welcome news that the Northeast Women's Center abortion chamber . . . would not have its lease renewed. . . . [T]his abortion chamber lost its lease because of the persistent prayers and protests of Pro Life citizens.

App. at 480-82.

sophisticated security system at its new location.[4] In August 1986, protesters made a fifth attempt to enter the Center, which the district court found was "thwarted only by the installation of sophisticated security equipment." App. at 260.

In August 1985, the Center filed a civil suit in the United States District Court for the Eastern District of Pennsylvania, alleging that Defendants had agreed among themselves and others to disrupt the Center's business and injure its property by, *inter alia*, harassing the Center's clients and employees, unlawfully entering on its property, and destroying and damaging medical equipment. The Center sought damages and injunctive relief under the Sherman Antitrust Act, 15 U.S.C. §§ 1, 15, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, and the common law torts of trespass and intentional interference with contractual relations. The district court denied Defendants' motion to dismiss the complaint. *Northeast Women's Center, Inc. v. McMonagle*, 624 F. Supp. 736 (E.D. Pa. 1985).

Thereafter, the Center sought preliminary injunctive relief, contending that Defendants had intensified their harassment of patients and staff, that they were acting to prevent the Center from moving to its new location, and that Defendants had forcibly entered its premises twice since the complaint was filed. The district court's denial of a preliminary injunction was vacated by this court because the district court had not made the factual findings required under Fed. R. Civ. P. 52(a). *Northeast*

4. Defendants challenge the measure of trespass damages, asserting that the Center cannot recover for its increased security costs. The Center, with appropriate citation to the record, notes that there was no objection to the district court's charge on this point. Defendants do not counter with any reference to the record showing that they properly preserved the issue. Accordingly, it is waived.

Women's Center, Inc. v. McMonagle, 813 F.2d 53 (3d Cir. 1987). We suggested "in the strongest possible terms" that the parties agree to convert the action into a final injunction hearing, *id.* at 54-55, which they did.

At the close of a three-week trial, the district court directed a verdict in favor of Defendants on the Sherman Act charge, but sent to the jury the remaining RICO, trespass, and intentional interference with contract claims. In response to a detailed series of interrogatories prepared by the district court, the jury found twenty-seven Defendants liable under RICO and assessed $887 in damages on this claim, reflecting the cost of repairing certain medical equipment, which the district court trebled pursuant to 18 U.S.C. § 1964(c) (1982). The jury found that three Defendants had interfered with the Center's contracts with its employees but found no proximate loss to have resulted from this interference and awarded no damages on this claim. Finally, it found twenty-four Defendants liable for trespass, and assessed $42,087.95 in compensatory damages and $48,000 in punitive damages ($2,000 per defendant).

The district court denied Defendants' motion for a new trial and judgment notwithstanding verdict except that it granted j.n.o.v. on the punitive damages award and set aside the jury's award of punitive damages on the ground that the Center had substantially prejudiced Defendants by failing to request punitive damages in a timely and consistent manner and by successfully precluding Defendants from presenting evidence of motive that would have been relevant on the punitive damages issue.

The court declined to give the Center any injunctive relief on its successful claims on the RICO and interference with contract counts on the ground that such relief was barred by the doctrine of unclean hands, based on evidence that a physician practicing

at the Center had failed to comply with a fetal tissue inspection provision of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3214(c) (Purdon 1983).

The court granted injunctive relief on the Center's trespass claim, however, and enjoined Defendants from entering the Center's premises, entering the parking lot adjacent to the Center for the purpose of protesting there, blocking or attempting to block the entrances to the Center or parking lot, and "[i]nhibiting or impeding or attempting to inhibit or impede the free and unmolested ingress and egress" to the Center or parking lot. App. at 287-88. The court specifically stated, that "[n]o portion of this Judgment shall be construed by any law enforcement officer so as to restrain the peaceful protesting, picketing, demonstrating, chanting, or leafletting by the defendants on the sidewalks abutting [the adjacent] road, EXCEPT as provided [under the rest of the order]." App. at 288.

As noted above, each side appeals. We turn first to the Defendants' challenge to the jury's verdict under civil RICO, the only remaining federal claim.

II.

Issues on Cross-Appeal

A. *Application of Civil RICO*

Plaintiff pled, and the jury's verdict shows that it found, a RICO violation based on a pattern of extortionate acts as defined under the Hobbs Act. The civil provisions of RICO allow "[a]ny person injured in his business or property" through a violation of the statute to file suit in federal district court. 18 U.S.C. § 1964(c) (1982). A defendant may be held liable under RICO for engaging through an enterprise in "a pattern

of racketeering activity." 18 U.S.C. § 1962(c).[5] such racketeering activity being manifested by, *inter alia*, any act, including robbery and extortion, which is indictable under 18 U.S.C. § 1951, also known as the Hobbs Act. 18 U.S.C. § 1961(1)(B). Defendants' arguments challenging the verdict against them under RICO are directed both to the application of civil RICO as such and to the application of the Hobbs Act.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985), the Supreme Court acknowledged that civil RICO was being applied in contexts far beyond those originally intended, but explained that "this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it. . . ." *Id.* at 499-500. In light of the Court's statements, we are not free to read additional limits into RICO once a plaintiff has made out all of the elements required for a finding of liability under the statute's explicit provisions. *See Gilbert v. Prudential-Bache Sec.*, 769 F.2d 940, 942 (3d Cir. 1985) ("The Court [in *Sedima*] refused to read into civil RICO any requirement, unexpressed by Congress, that the statute be confined to situations implicating organized crime . . . .").

Defendants argue that because their actions were motivated by their political beliefs, civil RICO is inapplicable. Defendants' description of their conduct as "civil disobediance" does not thereby immunize it

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5. The district court charged the jury that in order to prove an enterprise existed "[a]ll the plaintiff has to prove is the existence of an ongoing organization, either formal or informal in nature in which the various associates functioned as a continuing unit. The enterprise must have an existence separate and apart from the pattern of activity in which it engages." App. at 1006. Defendants did not object to this portion of the charge.

from statutes proscribing the very acts the jury found Defendants committed.

In upholding a conviction under RICO over defendants' objection to the government's contention that the robberies were committed to finance defendants' religious Black Muslim organization, this court stated, "The First Amendment, which guarantees individuals freedom of conscience and prohibits governmental interference with religious beliefs, does not shield from government scrutiny practices which imperil public safety, peace or order." *United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983) (citations omitted). We would have grave concerns were these or any other defendants held liable under civil RICO for engaging in the expression of dissenting political opinions in a manner protected under the First Amendment. The district court's careful instructions to the jury with respect to the scope of the protections of the First Amendment precluded such a result here.

The district court told the jury, "The First Amendment of the United States Constitution guarantees the defendants a right to express their views. The defendants have a constitutional right to attempt to persuade the Northeast Women's Center to stop performing abortions. They have a constitutional right to attempt to persuade the Center's employees to stop working there and they have a constitutional right to attempt to persuade the Center's patients not to have abortions there. . . . The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to a protest." App. at 1010.

However, the court also told the jury, correctly, that, "the First Amendment does not offer a sanctuary for violators. The same constitution that protects the defendants' right to free speech, also protects the

Center's right to abortion services and the patients' rights to receive those services." App. at 1011. The jury's award of damages under RICO was based on the destruction of the Center's medical equipment during one of the incidents of forcible entry into the Center. This award establishes that the jury found that Defendants' actions went beyond mere dissent and publication of their political views.

Defendants also argue that the Center failed to show that it suffered an injury to its "business or property" as required by RICO. 18 U.S.C. § 1964(c). The district court explicitly charged the jury with respect to this requirement. App. at 1020. Although Defendants argue that the Center failed to show any economic injury from the RICO violation, in effect Defendants' argument slides from the injury requirement under RICO to their claim that the Hobbs Act does not cover extortion of intangible rights. We will keep these issues analytically distinct. The RICO requirement of injury is met by evidence of injury to plaintiff's business *or* property. The Center claimed that it suffered tangible injury to its medical equipment during the forcible entry which was part of the alleged pattern of extortionate acts designed to drive it out of business. RICO requires no more. In *Sedima*, the Court rejected the notion of any distinct "racketeering injury," 473 U.S. at 495-97, holding expressly that it is not necessary that a plaintiff show that it suffered "a competitive injury." *Id.* at 497 n.15. The damage to the Center's property was sufficient to meet RICO's injury requirement.[6] *See Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3d Cir. 1986), *aff'd on other grounds*, 483 U.S. 143 (1987)

6. There was ample evidence that the Center, a profit-making institution, advertised in interstate commerce and drew patients from other states, thereby satisfying the RICO interstate commerce requirement.

(delay, added expenses and inconvenience caused by defendants' interference with a lawsuit sufficient to meet injury requirement under RICO); *Zap v. Frankel*, 770 F.2d 24, 26 (3d Cir. 1985) (district court's holding that plaintiff had to show injury "'of the type the RICO statute was intended to prevent'" reversed: RICO plaintiff need allege "no independent 'racketeering injury' apart from the injury caused by the predicate acts").

Defendants also challenge the application of the Hobbs Act, which provided the predicate offenses under RICO. Defendants argue that the court's charge failed to deal "with the economic motivation behind the crime of extortion," which they claim is a necessary element under the Hobbs Act. Brief of Cross-Appellants O'Brien et al. at 26 (hereafter "O'Brien Brief").[7] Defendants point to no charge proffered by them on economic purpose. In any event, Defendants' contention ignores well-established precedent holding that lack of economic motive does not constitute a defense to Hobbs Act crimes. In *United States v. Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), we upheld a Hobbs Act conviction for solicitation of political contributions, stating, "[i]t is well-established that a person may violate the Hobbs Act without himself receiving the benefits of his coercive actions." *See United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975) ("there is no

7. The Center argues that the evidence contradicts Defendants' claim that their activity was completely devoid of economic purpose, pointing to McMonagle's testimony that he raised $120,000 a year for the Pro-Life Coalition of Southeastern Pennsylvania which coordinated the protests at the Center and that he received a salary of $32,000 a year as the director of this organization. App. at 880-81. Because we conclude that economic motivation is unnecessary, we do not decide whether this evidence would be sufficient to show economic motivation.

exception to the Hobbs Act" permitting extortion "for a religious purpose"): *see also United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (upholding Hobbs Act conviction of anti-abortion activists for threatening doctor to induce him to cease performing abortions).

Defendants contend, however, that "economic injury" is an essential element of extortion when it is used as a RICO predicate offense. O'Brien Brief at 29. They argue that the court's charge improperly relied on extortion of intangible "rights". *Id.* at 28.

The "right" on which the Center's case was predicated was the right to continue to operate its business. The Center's extortion claim was that Defendants used force, threats of force, fear and violence in their efforts to force the Center out of business. The court told the jury that, "[s]pecifically, defendants are charged with attempting and conspiring to extort from the Center its property interest in continuing to provide abortion services[:] from its employees, their property interest in continuing their employment with the Center[:] and from patients, their property interest in entering into a contractual relationship with the Center." App. at 1009.[8]

Rights involving the conduct of business are property rights. As we pointed out in *United States v. Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986),

> other circuits which have considered this question are unanimous in extending the Hobbs Act to

8. We reject Defendants' argument that the district court improperly allowed extortion of employees to be asserted as predicate offenses. The evidence establishes that the harassment of Defendants' employees and patients was directly related to Defendants' goal to shut down the Center.

> protect intangible, as well as tangible, property. *See United Sates v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S. Ct. 1359, 67 L.Ed.2d 341 (1981) (right to solicit business accounts); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910, 99 S. Ct. 1221, 59 L.Ed.2d 459 (1979) (right to make business decisions free from outside pressure wrongfully imposed); *United States v. Nadaline*, 471 F.2d 340 (5th Cir.), *cert. denied*, 411 U.S. 951, 93 S. Ct. 1924, 36 L.Ed.2d 414 (1973) (right to solicit business accounts); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1262, 25 L.Ed.2d 530 (1970) (right to solicit business accounts).

It is, of course, no defense to extortion that Defendants did not succeed in their ultimate goal, although, as McMonagle's own letter admitted, Defendants' activities did contribute to the Center's loss of its lease at the Roosevelt Boulevard location. App. at 480-83; *see* note 3 *supra*. Attempted extortion and conspiracy to commit extortion are crimes under the Hobbs Act, *see* 18 U.S.C. § 1951(a), and "any act which is indictable under [the Hobbs Act]" is a predicate offense under RICO. 18 U.S.C. § 1961(1)(B). We thus reject Defendants' challenges dealing with the RICO verdict.

B. *The Justification Defense*

Defendants argue that the district court erred in precluding the admission of evidence relating to their claims of justification and in failing to charge the jury regarding such a defense. The district court relied on our opinion in *United States v. Malinowski*, 472 F.2d 850 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973), in

holding that the justification defense was unavailable to Defendants. In *Malinowski*, a defendant had falsely claimed excessive exemptions on a form submitted to the Internal Revenue Service to dramatize his protest to the Vietnam War. We rejected the defense of good faith motive, holding that the defendant's motives could not constitute an acceptable legal defense. *Id.* at 856. We stated that, "[s]uch a position represents a feeble effort to emasculate basic principles of civil disobedience, and, simply stated, is invalid. . . . [T]he actor wants the best of both worlds: to disobey, yet to be absolved of punishment for disobedience." *Id.* at 857.

Similarly, in *United States v. Romano*, 849 F.2d 812, 816 n.7 (3d Cir. 1988), we recently reaffirmed the irrelevance of any defense based on an intent to save lives in a case charging a defendant, who was associated with the Epiphany Plowshares, with damaging government property, conspiring to do so, and entering a military installation for an unlawful purpose. We stated that, "[the defendant's] end motive of protecting innocent lives could not adequately negate or explain her specific intent to achieve this end by breaking into a military installation and disabling military aircraft." *Id.* (citations omitted). Thus, it is clear that Defendants' claim of justification does not present a viable defense to the RICO charge.

Defendants argue, however, that justification is a defense under Pennsylvania law, citing to the Pennsylvania Crimes Code: 18 Pa. Cons. Stat. Ann. § 503(a) (Purdon 1983)[9], and its civil analogue. *See*

9. Section 503 of the Crimes Code provides:

> § 503. Justification generally.
>
> (a) General rule.--Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:
>
> (1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
>
> (2) neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (b) Choice of evils.--When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Restatement (Second) of Torts, §§ 76, 196 (1965). In *Commonwealth v. Capitolo*, 508 Pa. 372, 498 A.2d 806 (1985), the Pennsylvania Supreme Court held that under section 503 of the Pennsylvania Crimes Code, the availability of the justification defense rests on a defendant's ability to show: "(1) that the actor was faced with clear and imminent harm . . . ; (2) that the actor could reasonably expect that [his/her] actions would be effective in avoiding this greater harm; (3) that there [was] no legal alternative [that would have been] effective in abating the harm; and (4) that the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." 508 Pa. at 378, 498 A.2d at 809. The defendants in *Capitolo* had been convicted for criminal trespass based on their sit-in demonstration at a nuclear power plant which caused no injuries or property damage. The Supreme Court of Pennsylvania, applying the foregoing analysis, held that "[t]he trial court was correct in ruling that, as a matter of law, justification was not an available defense." 508 Pa. at 379, 498 A.2d at 809.

In a subsequent case, the Court applied the *Capitolo* factors to the justification defense codified under another section of the Crimes Code. *Commonwealth v. Berrigan*, 509 Pa. 118, 124, 501 A.2d 226, 230 (1985). On the basis of those factors, the Court rejected the contention of defendants convicted of burglary, criminal mischief, and criminal conspiracy in connection with a protest at a nuclear arms manufacturing facility that their actions were permitted to avert a nuclear holocaust.

The test in *Capitolo* was recently applied by the Superior Court of Pennsylvania in *Commonwealth v. Wall*, 372 Pa. Super. 534, 539 A.2d 1325 (1988), to defendants convicted of criminal trespass and defiant trespass during an abortion protest. In that unanimous opinion, the court upheld the trial court's order precluding the defendant from raising the justification defense. The *Wall* court found that the justification defense was not available because the defendant could not establish "*any*" of the four requirements set forth in *Capitolo*. 372 Pa. Super. at 543, 539 A.2d at 1329 (emphasis in original). Wall could not demonstrate that he was faced with a clear and readily apparent harm, because the law does not recognize abortions as a harm. 372 Pa. Super. at 540-42, 539 A.2d at 1328-29; Wall could not reasonably have expected that the demonstration would be effective because his disruption of the clinic was only temporary, 372 Pa. Super. at 542, 539 A.2d at 1329; he had available legal alternatives, such as lobbying and providing information to the clinic's clients while standing on public property, *id.*; and Pennsylvania legislation, while it regulated abortion, did not prohibit a woman from obtaining an abortion. 372 Pa. Super. at 542-43, 539 A.2d at 1329; *see also Commonwealth v. Markum*, 373 Pa. Super. 341, 541 A.2d 347 (1988) (announcing judgment of the court

that justification defense not available against criminal convictions stemming from August 1985 invasion of the Center).

The same analysis is applicable here. We emphasize in particular the numerous legal alternatives that Defendants had available to pursue their goal of persuading women not to have abortions. For example, they could continue to march, go door-to-door to proselytize their views, distribute literature, personally or through the mails, and contact residents by telephone, short of harassment. *See Frisby v. Schultz*, 108 S. Ct. 2495, 2501-02 (1988).

In one of their reply briefs, Defendants argue that *Wall* should be distinguished because the court there did not focus on Defendants' argument made here that abortions conducted in the second, as opposed to the first, trimester of pregnancy, together with the harm suffered by women undergoing abortions, amount to a harm of sufficient magnitude and imminence that the justification defense should be allowed. Because Defendants must meet each *Capitolo* factor, however, *see Capitolo*, 508 Pa. at 378-79, 498 A.2d at 809; *Commonwealth v. Berrigan*, 509 Pa. 118, 124, 501 A.2d 226, 229 (1985), we need not reach their argument concerning the character of the harm involved. We find no error in the district court's rejection of Defendants' justification defense.

C. *The Conduct of the Trial*

Defendants rather vehemently complain about the conduct of the trial. They point to a number of rulings by the district court which they argue constitute reversible error either as considered severally or as added together to create an unfairly prejudicial atmosphere at trial. In particular, they challenge the court's grant of the Center's motion *in limine* to exclude evidence of Defendants' motives and its refusal to grant a mistrial after the Center's counsel made

several allegedly "prejudicial and inflammatory" statements.

The jury was told in the Center's opening remarks that Defendants were opposed to abortion as a matter of principle. The court, in its jury charge, told the jury that "[w]e know why these people are up there and that is because they disagree with the position of the plaintiffs, that there should be abortions performed." App. at 946.

However, the district court's order precluded Defendants from putting on further evidence of their motives without making a prior showing of relevance.[10] Defendants acknowledged at oral argument that they never made an offer of proof of the relevance of the evidence of motive which they now argue they desired to present. Having failed to make such an offer of proof, they have waived this issue on appeal. *See* Fed. R. Evid. 103(a)(2). Moreover, on the merits, we note that we upheld a similar *in limine* order in *United States v. Romano*, 849 F.2d at 815-16.

The district court's orders denying Defendants' motions for a mistrial based on the allegedly inflammatory remarks made by the Center's counsel during the course of the trial are reviewed under an

10. The district court's order was, in relevant part, as follows:

> The plaintiff's motion to preclude the introduction of evidence concerning justification and motive is GRANTED. Defense counsel may, in the opening statement to the jury, explain the circumstances surrounding the defendants' presence in the plaintiff's property. Counsel may not extract testimony or introduce evidence of the defendants' beliefs on abortion absent a prior demonstration of the relevance of the proposed evidence. Counsel may not argue or imply to the jury, in either an opening statement or closing argument, that the defendant's beliefs afford them any type of legal justification defense.

App. at 124.

abuse of discretion standard. *See United States v. DeRosa*, 548 F.2d 464, 473 (3d Cir. 1977). We have examined each portion of the record to which Defendants refer us. Although we do not place our imprimatur on some of the conduct by various trial counsel, we conclude that the district court did not abuse its discretion in denying Defendants' motion for a mistrial. Far from having deprived Defendants of fundamental rights, we conclude that Judge James M. Kelly handled this emotionally heated trial fairly and evenhandedly. We will affirm all of the orders challenged by Defendants on their cross-appeals.

III.

Issues on Appeal

A. *Application of The Unclean Hands Doctrine*

The first of the two issues raised by the Center on its appeal challenges the limited injunctive relief awarded by the district court. The district court ruled that the Center was precluded from obtaining injunctive relief on any charge other than trespass because of the unclean hands doctrine. Although the district court enjoined Defendants from trespassing on the Center's property or the private parking lot next to the Center, and barred Defendants from obstructing the entrances to those premises, it gave no injunctive relief with respect to the acts of harassment and intimidation of the Center's employees and patients which provided the evidentiary basis for the jury's liability verdicts on the RICO and interference with contract claims.

In its discussion of the need for injunctive relief, the district court stated, "The spirited nature of [Defendants'] views permits no remorse or regret for their actions. No evidence produced at trial suggests that their unlawful modes of protest will cease. In fact,

the evidence suggests precisely the opposite." App. at 260. We can think of no reason why this finding, although made in the context of the district court's trespass discussion, is not equally applicable to Defendants' other activities. Nonetheless, the court refused to grant the additional injunctive relief requested by the Center because it concluded that section 3214(c) of the Pennsylvania Abortion Control Act had been violated because one of the Center's doctors testified that remains from those fetuses aborted in the second trimester were inspected for completeness by a pathology expert who was not board certified or board eligible.[11]

The district court held that the Center was charged with knowledge of the doctor's failure to comply with the Act's requirements, and that therefore the Center engaged in "inequitable conduct [which] bars injunctive relief on its RICO and interference with contract causes of action." App. at 269-70.

In the course of making this ruling, the district court felt compelled to consider and rule upon the

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11. 18 Pa. Cons. Stat. Ann. § 3214(c) provides:

> When there is an abortion performed after the first trimester of pregnancy where the physician has certified the unborn child is not viable, the dead unborn child and all tissue removed at the time of the abortion shall be submitted for tissue analysis to a board eligible or certified pathologist. If the report reveals evidence of viability or live birth, the pathologist shall report such findings to the department within 15 days and a copy of the report shall also be sent to the physician performing the abortion. Intentional, knowing, reckless or negligent failure of the physician to submit such an unborn child or such tissue remains to such a pathologist for such a purpose, or intentional, knowing or reckless failure of the pathologist to report any evidence of live birth or viability to the department in the manner and within the time prescribed is a misdemeanor of the third degree.

constitutionality of section 3214(c), although the constitutionality of the Pennsylvania statute was not an issue in this case and was then pending before another judge of the same court. Consequently, on appeal here the parties have devoted extensive briefing to this issue, the Attorney General has submitted a brief seeking to uphold the court's ruling on this issue, and the Center and some amici argue that this section is not operative. *See* note 12 *infra*. The parties' preoccupation with the constitutionality of section 3214(c) represents a diversion to collateral issues.

Ordinarily, an abuse of discretion standard applies to our review of the district court's application of the unclean hands doctrine. However, the parameters of the unclean hands doctrine implicate a matter of law.

As this court has explained, the equitable doctrine of unclean hands is not "a matter of 'defense' to the defendant." *Gaudiosi v. Mellon*, 269 F.2d 873, 882 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959). Rather, in applying it "courts are concerned primarily with their own integrity," *id.*, and with avoiding becoming "'the abettor of iniquity.'" *Monsanto Co. v. Rohm & Haas Co.*, 456 F.2d 592, 598 (3d Cir.), *cert. denied*, 407 U.S. 934 (1972) (citations omitted). Thus, the doctrine is to be applied "only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245-46 (1933).

The same principle applies under Pennsylvania law. *See In Re Estate of Pedrick*, 505 Pa. 530, 544, 482 A.2d 215, 222 (1984). Pennsylvania's Supreme Court has stated that the unclean hands doctrine is not to be applied "to collateral matters not directly affecting the equitable relations which exist between the parties." *Shapiro v. Shapiro*, 415 Pa. 503, 507, 204 A.2d 266, 268 (1964).

Even if there had been a violation of the requirement of section 3214(c) relating to examination of fetal tissue by one of the physicians practicing at the Center, an issue we do not reach,[12] such a violation is at most collateral to the matter involved in this lawsuit. Section 3214(c) is a technical provision aimed at policing compliance with the now inoperative nonviability certification requirement of section 3211.[13] It has no connection at all to the Defendants' actions which the jury found violated both federal and state law.

A recent Pennsylvania Supreme Court decision is illustrative of that Court's application of the unclean hands doctrine. In *In re Estate of Pedrick*, 505 Pa. 530, 544, 482 A.2d 215, 222 (1984), the Court held that unclean hands barred an attorney seeking to recover against an estate where the attorney sought "to secure a benefit from the very conduct which the accepted standards of the profession preclude." In contrast, in

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12. Because, as we hold in the text, the district court should not have reached that issue, we venture no opinion on the district court's conclusions that the Center failed to comply with section 3214(c) and that section 3214(c) is constitutional and enforceable under the statute in its present form.

13. In American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986), we held unconstitutional section 3211(a), the provision that required physicians to certify the nonviability of fetuses aborted after the first trimester of pregnancy. We expressly noted that the issue of the constitutionality of the related provision, section 3214(c), had been withdrawn from our consideration. 737 F.2d at 302. Thus, the continued validity of section 3214(c) remains an open question. The Center and some amici argue, however, that because section 3214(c) only requires inspection of fetal tissue after physicians have certified the nonviability of the fetus, and no such certification can now be required, section 3214(c) can have no effect. The district court did not address this argument, nor do we.

this case, the Center's alleged failure to insure that the pathologist who examined the fetal tissue was Board certified or Board eligible is not sufficiently, if at all, related to "the particular matter in litigation." *Shapiro*, 415 Pa. at 507, 204 A.2d at 268, to warrant application of the unclean hands doctrine to preclude granting the Center effective equitable relief from the Defendants' harassment of the Center, its employees, and its patients. Because the unclean hands doctrine can be applied only to conduct relating to the matter in litigation, we conclude that the district court erred in applying the unclean hands doctrine in this situation.

Defendants argue that further injunctive relief cannot be awarded under RICO because injunctive relief is not available to private parties under that statute's civil provisions. This is a question of first impression for this court and remains an open question in most other courts. *See Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (expressing "serious doubt" about availability of injunctive relief in private civil RICO cases); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (hinting that injunctive relief may be available). *But see Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1336 (1987) (injunctive relief not available); *In Re Fredeman Litigation*, 843 F.2d 821, 828-30 (5th Cir. 1988) (suggesting approval of *Wollersheim*). At oral argument the Center acknowledged that all the injunctive relief it seeks could be granted under its state law claim of interference with contractual relations, and therefore we will not reach to decide the RICO issue.

We see no impediment to basing injunctive relief on the interference with contractual relations verdict. The Center pleaded and proved that Defendants

embarked on a willful campaign to use fear, harassment, intimidation and force against the Center through targeting its employees so that they would, and some did, sever their employment at the Center. Employees testified that they were even harassed at their homes and that their children were afraid. Defendants stress that the jury found no damages on its interference with contractual relations verdict. Of course, the fact the Center could not show damage on this claim or that not all the Center's employees have been sufficiently frightened so as to terminate their contractual relations with the Center does not preclude injunctive relief designed to prevent future harm.

Defendants argue that the district court is limited in granting injunctive relief under the interference with contractual relations claim to enjoining the three Defendants found liable under that charge. However, injunctions under Pennsylvania law are commonly entered against defendants and "all persons acting in concert with them." *See, e.g., Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 422, 393 A.2d 1175, 1178 (1978) (reinstating permanent injunction containing this language in intentional inteference with contract case), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979).[14] In fact, the Superior Court of Pennsylvania recently considered and rejected a similar argument in upholding a contempt order entered against anti-abortion activists for violating an injunction prohibiting certain individuals and "all others acting in concert with them" from entering an abortion clinic for purposes of interfering with its services. *Crozer-Chester Medical*

14. Although Defendants argue that injunctive relief cannot be ordered when there has been no award of damages, we note that in *Adler Barish* only injunctive relief but not damages were awarded. *See* 482 Pa. at 419, 393 A.2d at 1176.

Center v. May, 366 Pa. Super. 265, 267, 531 A.2d 2, 4 (1987), *appeal dismissed*, 550 A.2d 196 (1988); *see also Neshaminy Water Resources Auth. v. Del-Aware Unlimited, Inc.*, 332 Pa. Super. 461, 471 n.2, 481 A.2d 879, 883-84 & n.2 (1984) (language binding all persons acting "in concert" with named defendants not impermissibly broad).

Fed. R. Civ. P. 65(d) expressly provides an injunction will be binding on persons "in active concert or participation" with the parties enjoined who receive actual notice of the order. In light of the jury's finding that the three Defendants against whom the verdict was entered on the interference with contractual relations claim combined in an enterprise with other Defendants, it appears that the record would support an injunction directed to concerted conduct.

The Center argues that because this is now the second time that the district court failed to grant it effective injunctive relief, we should ourselves either enter its proposed injunction or at least we should direct the district court to do so in clear and unambiguous terms. While such a course might be expeditious, we decline to fix the terms of the injunction.[15] The district court is in a better position, in compliance with the requirements of Rule 65(d), to set the terms of an appropriate injunction based on the evidence in the record.

Since we have found unsupportable as a matter of law the only basis on which the district court declined to issue a more extensive injunction, we must remand

15. The proposed injunction would have imposed time, place and manner restrictions, including limitation of the number of demonstrators, the use of sound amplification during surgical procedures at the Center, and the harassment of staff and patients. We note that since the district court's opinion, the Supreme Court has shed additional light on the issue of residential picketing in its opinion in Frisby v. Shultz, 108 S. Ct. 2495 (1988).

this matter so that it can reconsider the Center's arguments that the injunction entered is inadequate.

B. *Punitive Damages*

The second issue raised by the Center challenges the district court's order granting Defendants' motion for a j.n.o.v. setting aside the jury's award of $2,000 punitive damages against each of twenty-four Defendants found liable for trespass. The district court explained that it entered the j.n.o.v. because it had erred in submitting the issue of punitive damages in its charge to the jury. In this context, our standard of review is abuse of discretion. *See United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985) (points for charge reviewed for abuse of discretion).

The district court gave a number of reasons for setting aside the punitive damages. It referred to the Center's failure to mention punitive damages in its pretrial memorandum as it was required to do under a local rule; the Center's failure to object to the court's pretrial order specifying the damage elements in the case, which did not include punitive damages; the Center's untimely request for a charge on punitive damages; and the court's preclusion of Defendants' evidence on motive in response to the Center's motion *in limine*. The latter ground alone is sufficient basis to uphold the court's order.

It is clear that under Pennsylvania law motive would have been relevant to the issue of punitive damages. *See Chambers v. Montgomery*, 411 Pa. 339, 344-45, 192 A.2d 355, 358 (1963); *Hughes v. Babcock*, 349 Pa. 475, 480-81, 37 A.2d 551, 554 (1944). However, under the court's *in limine* order, Defendants were precluded from referring to or relying on their motives unless they made a prior showing of relevance. While it is true that Defendants did not

proffer motive evidence as relevant to their defense to punitive damages, the court's opinion suggests that Defendants were not on notice during the trial that the award of punitive damages was still an issue. A plaintiff may be barred from receiving relief it requests if its conduct "improperly and substantially prejudiced the other party." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975). As in *Albemarle*, the Center's "not merely tardy, but also inconsistent" conduct with respect to its claim for punitive damages, *id.*, prejudiced Defendants' ability to mount a case against imposition of such damages. It follows that the district court's ruling that the Center should not have been granted a jury charge on punitive damages was well within the scope of its discretion. Thus, we will not disturb the district court's award of a j.n.o.v. on this issue.

IV.

Conclusion

In summary, we have concluded on the cross-appeal that civil RICO could appropriately be applied to Defendants' intimidation and harassment of the Center resulting in the destruction of its property, that the district court did not err in rejecting the justification defense proffered by Defendants and in precluding evidence of Defendants' motives unless they showed the specific relevance of such evidence, and that there is no basis in the district court's conduct or rulings to order a new trial. On the Center's appeal, we have upheld the district court's order setting aside the punitive damages. Finally, we have held that the court erred in applying the unclean hands doctrine on a collateral matter to preclude injunctive relief.

For the reasons expressed herein, we will remand for further consideration of the injunctive relief to be

granted in light of our opinion. We will affirm the district court's judgment in all other respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 88-1333,1334,1335,1336

Northeast Women's Center, Inc.,

Plaintiff/Cross- Appellee

v.

Michael McMonagle et al.,

Defendants/Cross-Appellants

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, COWEN, and NYGAARD, Circuit Judges, and GERRY, District Judge*

The petiton for rehearing filed by

Michael McMonagle et al., defendants/cross-appellants,

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sleviter

Circuit Judge

Dated: March 30, 1989

* Hon. John F. Gerry, Chief Judge, United States District Court for the District of New Jersey, sitting by designation, as to panel rehearing only.

NORTHEAST WOMEN'S CENTER INC.

V.

MICHEAL McMONAGLE, ET. AL.

Civ.. A. No. 85-4845

MARCH 31, 1988

MEMORANDUM AND ORDER

JAMES McGIRR KELLY, District Judge

Presently before the court is the motion of the defendants for judgment notwithstanding the verdict pursuant to Fed.R.Civ.P.50(b), or alternatively, a new trial pursuant to Fed.R.Civ.P.59. At this juncture, the circumstances from which this action arose are well published. Plaintiff, the Northeast Women's Center, Inc., is a Pennsylvania corporation engaged in the business of providing pregnancy testing, gynecological care, counseling, and abortion procedures. Defendants are pro-life activists who have protested vigorously against abortion both in front of and outside of the Center.

Asserting injury as a result of defendants' activities, the plaintiff brought this civil action seeking money damages

and injunctive relief under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 et seq., 15; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), and the common law torts of trespass and intentional interference with contractual relations.

At the close of the plaintiff's case, this court directed the verdict on the plaintiff's anti-trust count. Northeast Women's Center, Inc. v. McMonagle, 670 F.Supp. 1300 (E.D.Pa.1987). The remaining claims were put to a seven-person jury.

Following four days of deliberations, the jury returned its verdict, finding all twenty-seven remaining defendants liable under RICO and assessed $887.00 in damages. The jury found twenty-four of the defendants liable for trespass and assessed $42,087.95 in compensatory damages and $48,000.00 in punitive damages. Three defendants were found to have intentionally interfered with plaintiff's employee contracts, but no award was made since the jury found that the Center had sustained no proximate loss as a result. Based on the jury's answers to the Special Interrogatories, the court entered judgment on the verdict on June 8, 1987 for plaintiff against all defendants in the amount of $2,661.00 for a

violation of RICO,[1] against twenty-four defendants in the amount of $42,087.95 for trespass, and against three defendants for the intentional interference with a contract, but without money damages awarded. The awardance of punitive damages was set aside by this court, for the reasons set forth in its Memorandum and Order, filed June 8, 1987. Northeast Women's Center, Inc. v. McMonagle, 665 F.Supp. 1147 (E.D.Pa.1987).

Presently the court turns to the resolution of the defendants' motions for judgment notwithstanding the verdict or in the alternative, for a new trial, pursuant to Rule 50(b) and Rule 59 of the Federal Rules of Civil Procedure. Since all defendants join in all cited grounds for the purposes of these post-trial motions, this court will consolidate its Memorandum and Order to apply equally to each defendant.

Standards of Review

It is well settled that "the standard for granting a judgment notwithstanding the verdict is precisely the same as the standard for directing the verdict. The motion for judgment can be granted only if the motion for directed verdict"

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1 The jury's verdict of $887.00 as to the RICO claim was trebled as provided under 18 U.S.C. § 1964(c).

should have been granted." 9 Wright and Miller, Federal Practice and Procedure ch. 7 § 2537.

A motion for judgment N.O.V. must be granted cautiously and sparingly, and is appropriate under very limited circumstances. The jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand.

[t]o grant a motion for judgment N.O.V., the court must

find as matter of law that the plaintiff failed to adduce sufficient facts to justify the verdict. The motion'may be granted only when without weighing the evidence, there can be but one reasonable conclusion as the proper

judgment.' Where there is conflicting evidence which could lead to inconsistent conclusions, a judgment N.O.V.

should not be granted. In considering the motion, the court must view the evidence in the light most favorable

to the party against whom the motion is made....

Marian Bank v. Intern. Harvester Credit Corp., 550 F.Supp. 456, 460 (E.D.Pa.1982) aff'd 725 F.2d 669 (3d Cir.1983) (citations omitted).

[1] Defendants have moved for a new trial on numerous grounds. Although Fed.R.Civ.P. 59 does not enumerate the grounds for a new trial, the following have been recognized as general grounds for a new trial: the verdict is against the clear weight of the evidence; damages are excessive; the trial was unfair; and that substantial errors were made in the admission or rejection of evidence or the giving or refusal of instructions. 11 C. Wright & Miller, Federal Practice and Procedure § 2805 (1971). "A new trial motion on the ground that the verdict is against the weight of the evidence is to be distinguished from a motion for a ... judgment notwithstanding the verdict which raises the legal sufficiency of the evidence." Rose Hall LTD. v. Chase Manhattan Overseas Banking Corp., 576 F.Supp. 107, 124 (D.Del.1983) aff'd 740 F.2d 958 (3rd Cir.1984). The Third Circuit enunciated the test as follows:

> [S]ince the credibility of witnesses is peculiarly for the jury, it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in

conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which

the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been,

then it is his duty to set the verdict aside; otherwise not.

Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir.1960), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960) (quoting 6 J. Moore, Moore's Federal Practice, (2d ed. p.3819).

I. PRE-TRIAL RULINGS

A. Preclusion of Justification Defense

[2] In this motion for a new trial, defendants reassert their objection to this court's Order of February 12, 1987 which

granted plaintiff's motion in limine to preclude evidence of justification or motive as a legal defense to defendants' actions. In the court's Memorandum and Order, the court held that defendants' moral beliefs on the issue of abortion would not provide a legal right to unlawfully damage plaintiff's property. See Northeast Women's Center, Inc. v. McMonagle, No. 85-4845, slip op. at 11-18 (E.D.Pa. February 12, 1987) [available on WESTLAW, 1987 WL 6666]. Defendants' counsel, in the opening statement to the jury was permitted to explain the circumstances surrounding the defendants' presence in the plaintiff's property. Counsel was directed not to argue or imply to the jury, in either opening statements or closing argument, that the defendants' beliefs afforded them any type of legal justification defense.

This court did not, as defendants contend, "prohibit testimony of motive and/or intent". Defendants' Supplemental Post-Verdict Motions, filed 12/1/87, (Docket Entry 252, p. 36). The Order of the Court expressly stated that such testimony or evidence could not be extracted or introduced absent a prior demonstration of relevance. Defendants do not point to any ruling at trial denying them an opportunity to demonstrate the relevance of any proposed evidence or testimony of motive

and/or intent. Therefore, I find defendants' contention without merit.

Secondly, it was stipulated between all parties that the defendants' actions were motivated by their moral and/or religious beliefs regarding abortion. The jury was apprised of the reasons underlying defendants' presence and activities at plaintiff's property and was fully instructed on defendants' constitutional rights and privileges in pursuing their protests. There is no question that the jury was apprised of the tenacity of which defendants hold their views on abortion.

B. Denial of a Stay

[3] Defendants argue that this court's pretrial denial of their motion for a stay of the proceedings pending the outcome of related state criminal prosecutions was error. To the extent that this court fully addressed this issue in its Memorandum and Order of February 12, 1987, and seeing no error in its prior ruling, defendants' motion for a new trial on this basis is denied. See Northeast Women's Center, Inc. v. McMonagle, No. 85-4845, slip op. at 21-22 (E.D.Pa. February 12, 1987).

Furthermore, defendants have not shown that they were at all prejudiced by the court's denial of the stay at trial

and plaintiff's reference to defendants' silence in not taking the stand in their own defense. The defendants elected not to take the stand and invoke their Fifth Amendment right against self-incrimination. Any finding that the defendants were prejudiced by this court's ruling denying the stay due to defendants' rights against self-incrimination would be pure speculation.[2]

C. Names of Clients

Defendants aver that this court erred by failing to order the release of the names and addresses of plaintiff's clients on the dates the defendants committed the alleged unlawful acts. The resolution of defendants' motion was referred to the Magistrate, who issued an Order on November 7, 1986, denying defendants' access to this information. Upon objection by defendants, this court reviewed the findings of the Magistrate on this issue and found that the Magistrate's preclusion of all such evidence was overbroad. By Order of this court, defendants were permitted to discover the city and

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2 Two defendants did testify and chose not to invoke their Fifth Amendment right, defendants Corbett and McMonagle.

state of domicile for each patient encompassed in defendants interrogatories on this issue. See Northeast Women's Center, Inc. v. McMonagle, No. 85-4845, slip op. (E.D.Pa. February 7, 1987) [Available on WESTLAW 1987 WL 6666]. Finding no valid reason to reconsider this ruling, defendants' motion for a new trial on this issue is denied.

This court notes that defendants make no showing of prejudice from this court's Order or how it prevented defendants from presenting a proper defense.

D. Denial of Defendants' Protective Order

[4] Defendants assert that this court erred in its pretrial refusal to issue a protective order for the records of the Pro-Life Coalition of Southeast Pennsylvania, a non-party, stating that the use and admission of this evidence was highly prejudicial to all defendants. Defendants do not state why the evidence was "highly prejudicial".

This court's Order of July 29, 1986 addressed plaintiff's motion to compel the discovery of and defendants motion for a protective order regarding the discovery of the fundraising, expenditure and corporate records of the Coalition

and of any other anti-abortion organizations with which defendant Michael McMonagle has been affiliated with since January 1981. See Northeast Women's Center, Inc. v. McMonagle, slip op. (E.D.Pa. July 29, 1986) [Available on WESTLAW, 1986 WL 8341]. Pursuant to Fed.R.Civ.P. 26(b), this court stated, inter alia, that such materials as to defendant McMonagle, may assist plaintiff in showing proof of the planning or organization of the predicate offenses and/or offenses constituting the alleged state law violations. The court did not rule that the materials were to be admitted--plaintiffs were required to prove relevance, as in any case.

At trial, plaintiff sought to introduce minutes of the Board of Directors meeting of the Coalition. Defense counsel duly objected as to relevance. Plaintiff offered records for the purpose of showing that: (a) a number of the defendants were present at the meetings; (b) documents were signed by a defendant on behalf of the Coalition; (c) fund-raising letters sent by the Coalition were signed by a defendant regarding the protest activities of the Coalition which mentions defendants' activities at the plaintiff's place of business (N.T. 2-80-2-93.) Upon a proper showing of relevance to this action, this court admitted the documents into evidence. I find no error in the

ruling. Therefore, defendants motion for a new trial on this basis is denied.

A. Defendants assert that this court erred in denying defendants' motion for a mistrial after the giving of an illustrative hypothetical instruction. This court is unable to respond to defendants' assertions because they have failed to state where in the record or what day in the trial this instruction was given. Although this court has diligently searched the trial transcripts to find other evidentiary objections the defendants cite as a basis for a new trial, the review necessary to respond to defendants' contention is not this court's responsibility. This court recognizes that defendants' preliminary post-trial motions were submitted before the transcripts were available, but defendants have had several months in which to supplement these objections with the proper and necessary cites to the official record. Therefore, this court will deny defendants' motion for a new trial on this basis.

B. Defendants claim that the court erred when it refused defendants' requests to declare a mistrial and/or poll the jury due to allegedly prejudicial remarks made by plaintiff's counsel in his opening statement to the jury: "Judge Kelly has given you a very good outline of what the legal

dispute is, but I would like to talk to you a little bit about what this case is about in another sense and I think that when you hear the evidence, you will find out what this case is about, is really about tolerance. Tolerance for different people's religious beliefs and tolerance for different people's political beliefs." (N.T. 2-39.)

Plaintiff's counsel than proceeded to discuss the right of the American people to be free to subscribe to any religious belief they choose, the tolerance other Americans have for that choice, and the lack of tolerance of the defendants for the view of others on the issue of abortion rights. (N.T. 2-39/2-42).

After Mr. Tiryak finished his statement, the court recessed for lunch, during which a juror expressed fears that she could not be fair in this case because of her Catholic beliefs and her personal views on abortion. At this point, defendants objected to planintiff's opening statement. (N.T. 2-50) After a hearing and an examination of the juror, the juror was excused. (N.T. 2-48/2-52) After argument, this court decided that a curative instruction was needed, and was given. (N. T. 2-60/2-61) Opposing counsel, in their opening remarks, took the opportunity to explain further that the case

was not about a lack of tolerance for others' religious beliefs. (N.T. 2-78/2-80)

A new trial may be ordered where counsel engaged in improper conduct which had a prejudicial effect on the jury. See Draper v. Airco, Inc., 580 F .2d 91 (3d Cir. 1978). The appropriate inquiry is whether there is a "reasonable probability" that the jury's verdict has been influenced by the improper conduct of counsel. Commercial Credit Business Loans, Inc., v. Martin, 590 F. Supp. 328, 330 n. 2 (E.D. Pa 1984), quote Draper, 580 F. 2d at 97. Due to the curative instructions of this court after the prejudicial remarks, and indeed, all throughout this trial, and the opportunity for rebuttal of defense counsel, I do not feel that there is a "reasonable probability" that the jury's verdict was improperly influenced by the remarks and, therefore, a new trail will be denied on this basis.

C. Defendants aver that this court erred because it "barred defendants from calling witnesses to testify in mitigation to the asserted [trespass] damages". More specifically, defendants state that this court barred the testimony of witnesses Pat Soda and O'Brien. Such testimony was allegedly offered to disprove plaintiff's claim that security

guards were hired solely because of defendants' actions. There is no merit to defendants' assigned "error".

This court never "prohibited" defendants from introducing evidence that plaintiff's actions as to the perceived security needs of the clinic were not solely the result of the actions of the defendants. As to the offered testimony of Mr. O'Brien, the court found that the substance of the proposed testimony was double hearsay, and not the competent testimony of a witness. (N.T. 12-93) Mr. O'Brien was permitted to testify as to his personal knowledge of the prayer vigils and protests outside the clinic at 9600 Roosevelt Boulevard. (N.T. 12-94)

[6] As to the offered testimony of Pat Soda, a counsel for the defense, Mr. Short, stated at trial that Ms. Soda's testimony was offered as to

> [a] limited subject that I developed with Ms. Ryder about the protestants claim or representations before the zoning board, demanding security. It does not intend to evoke hearsay--maybe it won't be hearsay of Ms. Ryder or Ms. Ryder's response. It's for the limited purpose of the fact that there were protests made of

security and it would create the inference what was

brought out on cross-examination was true. Ms. Ryder's

answers to my questions on cross examination, which I

don't remember. I don't remember. It goes to damages.

(N.Y. 12-56)

As far as the offer of proof went, Mr. Short insisted that Ms. Soda's testimony was offered to impeach the testimony of Ms. Ryder. Ms. Ryder, a witness for plaintiff, was cross-examined by Mr. Short as to the substance of a zoning hearing held on an application for the new site of the clinic.

Ms. Ryder repeatedly stated on cross-examination that she did not remember what she might have testified to at that hearing as to the concerns of future neighbors as to vandalism of the clinic. (N.T. 10-52) Overruling an objection by plaintiff, this court allowed cross-examination on the issue of security for the clinic since it was relevant to whether the clinc needed security for reasons other than the actions of the protestors. (N.T. 10-52) In fact, Mr. Short cross-examined

Ms. Ryder extensively as to whether the damages claimed as security expenses by plaintiff were attributable solely to the protestors and the reason for the move. (N.T. 10-52 up to 64) Testimony as to the previous incidents of vandalism was adduced. (N.T. 10-52; 10-58)

The transcript of the hearing was available in order to impeach the credibility of Ms. Ryder's answers on cross-examination. Mr. Short declined to make use of it. Mr. Short repeated his assertions that the testimony of Ms. Soda was for the sole purpose of impeaching the credibility of Ms. Ryder as to her failure to recollect any discussions about security needed for purposes other than keeping out the protestors. (N.T.12-67) On the basis of Mr. Short's assertions, this court properly disallowed the testimony of Ms. Soda for impeachment purpose.

III. EXTORTION

The court gave the following instructions to the jury as to extortion:

> Under the law, a person is guilty of extortion if he induces his victim to part with property through the use of fear and doing so adversely effects interstate commerce. A person is guilty of extortion not only

for completed extortions, but for attempted extortions and conspiracy to attempt extortions as well. The law says a person is guilty of extortion whether he induces his victim to part with property. We don't mean jewelry or a car, personal property, the word `property` also denotes intangible property. Property interest in something, such as the right to make a business decision free from wrongly imposed outside pressures.

Plaintiff claims the defendants, through the use of fear as instilled by their allegedly illegal protest activity, attempted and induce:

1. The Center
2. The employees.
3. Its patients to part with the intangible property interests.

Specifically, defendants are charged with attempting and conspiring to extort from the Center its property interest

in continuing to provide abortion services from its employees, their property interest in continuing their employment with the Center and from the patients, their property interest in entering into a contractual relationship with the Center.

Now, as I told you at the beginning of this trial, the defendants' activities reflect their views opposing the plaintiff's choice of business. In other words, there is no question that the defendants, most, if not all of them, oppose abortion activities at the Center.

[Instructions on First Amendment right to express their views.]

Forceful, unauthorized entry on another's property is not constitutionally protected. If you find any of the defendants by entering the Center's property without authorization or by otherwise wrongfully preventing the Center from operating, induced or attempted to induce either the Center or its employees or its patients to part

with property as a result of fear, you may find that those defendants are liable for extortion.

N.T. 14-19 through 14-22. Defendants assign the following points of error to this jury instruction.

1. Defendants argue that the definition of extortion given to the jury is actually the definition of trespass. This objection is without foundation. The instruction clearly states that the commission of an extortionate act involves not only an unauthorized entry onto plaintiff's property, but also an intent to induce the Center, its employees or its patients to part with property through the use of fear.

2. Defendants assert that plaintiff had no standing to assert injuries from the extortion of its employees.

[7] This particular issue was previously addressd by this court in its Bench Opinion of May 8, 1987, see Northeast Women's Center v. McMonagle, 670 F. Supp. 1300, 1307 n. 11 (E.D. Pa.1987). The court found that the language of the RICO statute makes no requirement that the plaintiff be the victim of the predicate acts so long as the plaintiff is injured as a result of the acts. I find that this interpretation of the RICO statute is controlling and therefore defendants' objetions to the charge on this basis is denied.

[8] 3. Defendants' third assignment of error is more troubling. Defendants assert error in the court's instructions that a person is guilty of extortion if they find any of the defendants "conspired to attempt extortion" (N.T./14-20) in that a conspiracy to attempt a crime is a double inchoate crime and therefore no crime at all.

Upon a thoughtful review of the transcript, this court duly recognizes the inadvertent error of using the term "attempt" instead of "commit" to the instruction on "conspiracy to commit extortion" and attributes it to oversight and a misreading of the instruction at hand. However, I find that the mistake was not so prejudicial as to warrant defendants the right to a new trial.

Firstly, this court points out that this assignment of error was fully correctable if defendants had followed Fed. R. Civ.P. 51. The object of the rule is to afford the trial judge an opportunity upon second thought, and before it is too late, to correct any enadvertent or erroneous failure to charge. 9 Wright & Miller Federal Practice and Procedure ch. 7 2551, citing from Marshall v. Nugent, 222 F.2d 604, 615 (1st Cir. 1955). The necessity of a retrial is avoided when, by design or thourgh sheer neglect, the losing party fails to make a

proper objection at the proper time. 9 Wright and Miller, Federal Practice and Procedure ch. 7 2551. If defendants had objected at the proper time, a clarifying instruction could have been given, and fourteen trial days would not have been jeopardized. Therefore, I find that defendatns have waived this objection.

Alternatively, the addition of the word "attempt" in the court's charge on conspiracy to commit extortion, looking at the instructions in the entirety, as we must, is not so highly prejudicial as to warrant a new trial. The court gave instructions at length on the composition of a conspiracy and the necessity of an overt act. The interrogatories mandated a finding of an overt act. The instructions given on the whole as to what is needed to find extorton and the examples given therein, made the proper elements clear. The charge as a whole correctly charged the jury that extortion as defined under the Hobs Act includes attempted extortion and conspriacy to commit extortion. Specifically, this cout repeatedly gave instructions on extortion as encompassing attempting and conspiring to extort. (N.T. 14-20) Therefore, defendants are not entitled to a new trial on this basis.

4. Defendants assert that this court improperly charged the jury as to attempted extortion and conspiracy to commit extortion since plaintiff never pleaded these charges as predicate acts in its comlplaint. infind this objection baseless for two reasons.

Firstly, I find defendants' objection to the charge on this point comes too late. At no time throughout the trial did defendants object to plaintiff's introduction of evidence as to the two acts. Secondly, defendant cannot be heard at this date to claim ignorance of plaintiff's theory of the necessary RICO predicate acts.

It cannot be reasonably believed that defendants lacked notice at the time the instructions were given as to these two allegations. As early as December 22, 1986 defendants filed a motion for summary judgment which asserted as a basis for judgment that "[p]laintiff has no standing to allege inchoate crimes of conspiracy attempt as there would be no concomitant injury to its business or property." See Defendants Motion for Summary Judgment on Plaintiff's RICO Claim. Since the entire purpose of a pleading is to give notice to the opposing party, and since defendants knew that the plaintiff was relying

on the predicate acts of attempted extortion, motion for a new trial on this basis is denied.

[9] 5. Defendants claim that the court erred by instructing the jury that a conspiracy to commit extortion or attempted extortion may be proper predicate offenses under RICO, since, by definition, the required impact on plaintiffs' business and property is absent. This court disagrees. Sufficient evidence was adduced at trial and the jury so found that plaintifs' property and business was harmed due to the action of the defendants--whether the actions go under the label of actual extortion, attempted extortion, or conspiracy to commit extortion. If defendants' assertion was correct, innocent parties would have to be completely driven out of business in order to collect damages uinder RICO, rather than obtaining relief from, and damages for the actions of violators when they are ongoing and continuous. Interpreting the law as defendants assert would reward them for their valiant but insuccessful attempts. Therefore, defendants will not be granted a new trial on this basis.

[10] 6. Defendants claim that the court erred by instructing the jury that the violation of plaintiff's intangible right to conduct business is "property" that is capable of

extortion, and cite the recent Supreme Court case of McNally v. United States, U.S. , 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

The court previously addressed defendants' argument as to the applicability of extortion under the Hobbs Act of intangible property rights. See Northeast Women's Center v. McMonagle, 670 E.Supp. 1300 (E.D.Pa.1987). For Hobbs Act purposed, the term "property" includes intangible property interests such as the right to make business decisions free from wrongfully imposed outside pressures. The court based this finding on the Third Circuit opinion of United States v. Local 560 of the International Brotherhood of Teamsters,780 F.2d 267, 290 (3d Cir. 1985), cert. denied, 476 U.S. 1140, 106 S.Ct. 2247, 90 L.Ed.2d 693 (1986).

Upon a careful review of the recent Supreme Court precedent of McNally and a subsequent interpretation of that ruling in the Supreme Court decision in Carpenter v. United States, U.S. , 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), I find that the Third Circuit decision in Local 560 is still controlling as to the applicability of the Hobbs act for the

extortion of intangible property rights such as those presented in this case.[3]

7. Injury to Business or Property

[11] Defendants assert that the court erred in denying their motion for a directed verdict on the basis that plaintiff failed to prove that theyt were injured in their business or property within the meaning of the RICO act.

Section 1964 (c) provides that "any person injured in his business or property. . . may sue therefore . . ." A plaintiff seeking recovery under RICO must allege injury "in his business or property" cause by violation of the Act. 18 U.S.C.A. 1964.

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3 The Supreme Court held in McNally v. United States that the mail fraud statute, (18 U.S.C. 1341) does not reach "schemes to defraud citizens of their intagible rights to honest and impartial government." McNally 483 U.S. at _____, 107 S.Ct. at 2881. The Supreme Court subsequentl limited its holding in McNally in Carpenter. The "intangible property right" asserted in Carpenter was the Wall Street Jounal's interest in the prepublicaton confidentiality of their daily column "Heard on the Street" which discussed information on selected stocks. In ruling that McNally did not limit the scope of 1341 to tangible as distinguished from intangible property rights, the Court stated that the intangible property right asserted by the Journal was not as "ethereal" as the intangible right asserted in McNally. Carpenter,_____ U.S., at _____,

In this case, plaintiff alleged and presented evidence of two distinct injuries--physical injury to its property and injury to its business because it was forced to spend more money to maintain its operations in the face of defendants extortionate acts. The jury found the plaintiff proved by a preponderance of the evidence that it suffered an injury to its business or property as a proximate result of the racketeering activity of defendants amounting to $887.00. Therefore, I will deny defendants' motion on this ground.

IV. MOTION FOR JNOV OF DEFENDANT LINDA CORBETT

The jury found defendant Corbett liable under 1962 (d), for conspiracy to violate the provisions of the RICO Act. Section 1962 (d) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section....

Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[12, 13] To prove conspiracy under sectio 1962 (d), plaintiff must prove by a preponderance of the evidence that defendant Corbett agreed to the substantive subsection (c) RICO offense or that defendant Corbett agreed to participate in the conduct of the enterprise's activities through the commission of predicate offenses. Proof merely of agreement to commit the predicate acts is insufficient. Proof merely to participate in the enterprise is insufficient. United States v. DiGilio, 667 F.Supp. 191, 194 (D.N.J.1987), citing United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed. 2d 145 (1983). To be found liable of RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not personally agree to commit personally those acts. The Town of Kearny v. Hudson Meadows Urban Renewal Corp. 829 F.2d 1263, 1266 (3d Cir. 1987); United States v. Adams, 759 F. 2d 1099 (3d Cir.), cert. denied, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed2d 321 (1985).

[14] Proof of an agreement in a RICO proceeding may be established by circumstantial evidence to the same extent

permitted in traditional conspiracy cases. It is well established that one conspirator need not know the identites of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it. Riccobene, 709 F.2d at 225; Blumenthal v. United States, 332 U.S. 539, 68S.Ct. 248, 92 L.Ed. 154 (1947).

This court correctly charged the jury that in order to find that a defendant became a member of a conspiracy, defendant must have knowingly and intentionally participated in the conspiracy. Mere knowledge by a defendant of the existence of a conspiracy or of any illegal act on the part of an alleged co-conspirator is not sufficient to establish his membership in a conspiracy. (N.T. 14-27) Further, the court expressly stated that "You may also find that [the defendant] agreed to participate in the affairs of the enterprise through a pattern of racketeering activity if you find that he personally agreed to commit two or more racketeering acts to further the affairs and you need only find he agreed to commit these acts. You don't have to find that he in fact actually committed those acts." (N.T. 14-29) The court carefully cautioned the jury that "mere association" with one or more co-conspirators does not make a person a member of a conspiracy. (N.T. 14-29)

[15] Viewing the record in the light most favorable to plaintiff, I find that the evidence was insufficient as a matter of law to hold defendant Corbett liable under Section 1962 (d). Namely, no evidence was presented as to the existence of any agreement whereby Ms. Corbett would conduct or participate in the activities of the enterprise through the commission of predicate offenses as defined under RICO.

The sole evidence plaintiff presented to support a claim against Ms. Corbett was presented on videotape. Ms. Corbett was shown to be present on the parking lot in front of plaintiff's clinic at certain times voicing her objections to plaintiff's provided services. She was shown participating in the "blockading" of an entrance onto plaintiff's property, and standing in front of a clinic physician's car.

In cases proceeding under Section 1962(d), "[t]he key element is proof that the various crimes were performed in order to assist the enterprises' involvement in corrupt endeavors." United States v. Riccobene, 709 F.2d at 224, quoting Blakely and Goldstock, On the Waterfront: RICO and Labor Racketeering, 17 Am.Crim.L. Rev. 341, 360-62 (1980) (emphasis added). There is no dispute that no evidence was presented that would suggest that Ms. Corbett committed any

extortionate acts--the predicate offense the jury found the enterprise committed. Even if it could be said the defendant Corbett acted along with members of the enterprise at certain times, there was no evidence from which a jury could reasonably infer that she acted in futherance of its extortionate goals rather that its organized protests.

Futhermore, no evidence was adduced at trial from which the jury could have even inferred that an implicit or actual agreement existed between Corbett and members of the enterprise whereby Corbett would conduct or participate in the conduct of the enterprises' activities. The most that could be inferred from the record is that Corbett may have agreed to participate in the constitutionally protected protest activities sponsored by members of the "enterprise", but not the extortionate goals of the enterprise. Therefore, this court will grant the motion for judgment notwithstanding the verdict of defendant Corbett.

V. TRESPASS CLAIM

[16] In their answers to Spectial Interrogatories, Section II, the jury found that twenty-four defendants intentionally entered land in the possession of the plaintiff without privilege to do so, or directed another to so enter the

property. As a proximate result of the unauthorized entries, plaintiff suffered an injury to its business or property in the amount of $42,974.00. Since $887.00 of this amount had been awarded to plaintiff under the RICO claim, this amount was reduced to $42,087.95 to avoid a duplicative recovery.

Defendants Long and Baker seek a judgment notwithstanding the verdict on the basis that there was no evidence that they entered the plaintiff's property. To the extent that this court has found that the plantiff produced sufficient evidence to withstand a directed verdict as to these two defendants, defendants' motion is denied. See Northeast Women's Center v. McMonagle, 670 F.Supp. 1300 (E.D.Pa1987).

Defendants contend that this court erred by permitting the jury to award plaintiff damages for injury to its business as well as injury to its property under the trespass claim. Twelve defendants state that August 10, 1985, is the only date that damage to either personal or real property of the plaintiff occurred.[4] Since there was no evidence that these defendants

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108 S.Ct. 316 at 320 (1987).

> The Journal . . . was defrauded of muchmore than its contractual right to [its employees'] honest and faithful service, and interest too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual proerty rights'". Carpenter 108 S.Ct. at 320.
>
> The court held that the"intangible nature of the Journal's right oto its won condidential business information does not make it any less 'property' protected by the mail and wire fraud statutes." Carpenter 108 S.Ct. at 320 at 4009.
>
> Therefore, assuming the "property" protected by the mail fraud statute and the Hobbs Act is identical, plaintiff's intangile right to make business decisoins free from wrongful imposed outside pressures is not so "ethereal" as to come under the holding of McNally, but is a widely recognized individual property right similar to that found sufficient in Carpenter.

[4] These defendants are: Donna Andracavge, Annemarie Breen, Mary Byrne, Margaret Caponi, Juan Guerra, Thomas Herlihy, Anne Knorr, Thomas McIlhenny, Michael McMonagle, Patricia McNamara, Robert Moran, and Dennis Sadler.

[5] These defendants are: Paul Armes, Walter Gies, Ellen Jones, Roland Markum, Stephanie Morello, John O'Brien, Susan Silcox, Henry Tenaglio, Joseph Wall and Howard Walton.

trespassed on that date, they should be assessed only nominal damages. Ten defendants admit that evidence was presented as to their presence in plaintiff's property on August 10, 1985, but submit that they should only have to pay for the actual damage to plaintiff's real property, not for any injury to plaintiff's business. [5] Defendants submit that the only applicable damage presented was the damage to plaintiff's equipment which, defendants aver, is represented by the $887.00 figure. The balance of the award represents the cost

of security guards which plaintiff hired to keep defendants from trespassing. See Testimony of Ardis Ryder, N.T. 10-3

Applying Pennsylvain law, the Pennsylvania Supreme Court stated:

> The authorities are clear to the effect that where the complaint is for trespass to land the trespasser becomes liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect and consequential.

Kopka v. Bell Telephone Co. of PA., 371 Pa. 444, 451, 91 A.2d 232 (1952). The Pennsylvania Supreme Court Pronouncement follows the general rule in regards to tortfeasors in general; that the trespasser is responsible in damages for all injurious consequences flowing from his trespass which are the natural and proximate result of his conduct. See 75 AM.Jur.2d, Trespass, Section 52. This court sees no valid reason why a trespasser could not be held liable for injuries to his or her business which are properly found by a jury to be the proximate cause of defendants' actions. Plaintiff's injuries as alleged and proven were not unduly indirect or remote from defendants' trespass. Therefore, defendants' motion on this ground is denied.

An order follows.

ORDER

AND NOW, this 31st day of March, 1988, upon consideration of defendants' mootion for judgment motwithstanding the verdict, or alternatively, for a new trial, and the responses thereto, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. The motion of defendant Linda Corbett for judgment notwithstanding the verdict is GRANTED. Judgment is entered in favor of defendant Linda Corbett and against plaintiff Northeast Women's Center, Inc.

2. The motion of all other named defendants for judgment notwithstanding the verdict, or in the alternative , motion for a new trial is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC. : CIVIL ACTION

V. :

MICHAEL McMONAGLE, et al, : NO. 85-4845

BENCH OPINION

KELLY, J.

MAY 14, 1987

The jury asks: "Can one act constitute two extortions under RICO?" There is no easy answer to this question. Technically, one act can constitute two common law extortions in the same way that one act could constitute two commnon law robberies. For example, if a robber forces a bus driver to

open the bus' doors, then enters the bus, waving a gun at the 16 passengers on board and demands: "Give me your money or I'll shoot", you could technically conclude that there have been 16 robberies. The robber only waved the gun once. He only physically threatened the passengers once. Nevertheless, 16 different persons were "robbed": the robber physically took from 16 different persons their property with the intent to permanently deprive them of it with the use or threat of force.

This technical analysis is insufficient under RICO. In order to recover under § 1962(c) or (d), the plaintiff must establish a "pattern of racketeering activity". Section 1961(5) defines "pattern of racketeering activity" as "at least two acts of racke-teering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982). Similarly, in Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985), the Supreme Court explained that "while two acts are necessary, they may not be sufficient." [1] Id. at 3285 n.14. The court, concerned

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[1] See United States v. Frumento, 409 F. Supp. 136, 139 (E.D. Pa. 1976) (pattern requires showing of at least two seperate instances of racketeering activity), aff'd, 563 F.2d 1083 (3d Cir.1977), cert. denied, 434 U.S. 1072 (1978).

with the definition of "pattern" under RICO, noted that "[t]he legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern." Id. The Court suggested that the congressional bill itself might be useful in interpreting the Act: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or other-wise are interrelated by distinguishing characteristics and are not isolated events." Id.

In light of this review, the court concludes that the jury may find, from one event or action taken on the part of a defendant, evidence of two or more seperate extortions. Thus, one act could support a conclusion that the defendant involved attempted to extort the Center's business from the plaintiff, his or her job from an employee, and her right to have an abortion from a patient. However, the commission of one act will not be sufficient under RICO to establish a pattern of racketeering activity. RICO requires that the plaintiff prove "at least two acts of racketeering activity" in order to be entitled to a RICO recovery.

BY THE COURT:

/S/

.....

RESPONSE TO JURY REQUEST

From one act, you may find evidence of the existence of two or more extortions. However, in order to prove a "pattern" of racketeering activity as is required under RICO, the plaintiff must prove the occurrance of at least two distinct acts, at two seperate times, of racketeering activity that are somehow related in purpose, result, participants, victims, or methods of commission.

Northeast Women's Center, Inc.

v.

McMonagle, et. al.

Action

Civ. A No. 85-4845

United States District Court,

E.D. Pennsylvania.

May 8, 1987.

BENCH OPINION

JAMES McGIRR KELLY, District Judge.

The plaintiff Northeast Women's Center, Inc. ("Center") brought this civil action against thirty one[1] anti-abortion protesters who have participated in various protest activities outside and inside the Center. The plaintiff seeks

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1 The amended complaint originally named forty-two persons as defendants in this action. Prior to trial, the plaintiff dismissed five persons. During argument on this motion, the plaintiff dismissed six other persons. There are now thirty-one persons remaining as defendants.

money damages and injunctive relief under four theories: a federal claim under the Sherman Antitrust and Clayton Acts, 15 U.S.C. §§ 1, 15; a federal claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964; a pendent claim for trespass; and a pendent claim for intentional interference with contractual re-lations. Following nine days of testimony during which the jury viewed over two hours of video tape and heard from ten plaintiff witnesses, the Center rested. Now before the court are the defendants' motions for directed verdicts.

[1] Under Federal Rule of Civil Procedure 50(a), the trial court must direct the verdict if, under the applicable law, there can be only one reasonable conclusion as to which party should pre-vail. *See Brady v. Southern R. Co.*, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234-35, 88 L.Ed.239(1943). The mere fact that a scintilla of evidence supports the plaintiff's case will not defeat a motion for directed verdict. *See Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442,448, 20 L.Ed. 867(1872). Instead, the court must ask "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505,2511, 91

L.Ed.2d 202(1986). In making this inquiry, the court must leave credibility determinations, the weighing of the evidence, and the drawing of proper inferences to the jury; the plaintiff's evidence is taken as true and all justifiable inferences are drawn in the plaintiff's favor. *Id.* 106 S.Ct. at 2513.

Due to the number of the claims in this case and the disjointed presentation of the evidence, the court decided it was necessary to conduct an extended hearing on the defendants' motions. Following four hours of argument and a complete review of the evidence, the court concludes that the defendants' motions will be granted in part and denied in part. The specific rulings and their explanations follow.

I. SHERMAN ANTITRUST ACT CLAIMS

As set forth in the complaint, the plaintiff contends that the defendants conspired to restrain trade and commerce in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Amended Complaint at ¶ 84. Specifically, the plaintiff argues that the manifest intent of the defendants' protest activities was to destroy the Center's abortion procedure business.[2]

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2 According to testimony at trial (taken, for purposes of this motion, as truth) abortion procedures account for 35% of the Northeast Women's Center's clients.

Accordingly, the plaintiff asserts that it is entitled to treble damages pursuant to 15 U.S.C. § 15.

Section 1 of the Sherman Act declares that "[e]very... conspiracy, in restraint of trade or commerce among the several States... is... illegal...." 15 U.S.C. § 1(1982). Although, if interpreted literally, Section 1 would prohibit *any* agreement in restraint of trade, the courts have recognized that only those agreements which unreasonably restrain trade or commerce violate the Sherman Act.[3] *See Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985).

[2] A year and a half ago, in finding that the plaintiff's antitrust count survived a motion to dismiss, the court acknowledged that the dissimilarity between the plaintiff's

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3 In addition to this case-by-case "rule of reason" analysis, the courts have adopted a seperate "per se illegal" rule that is applied to certain business practices that are definitionally condemned. *See Weiss v. York Hosp.*, 745 F.2d 786, 817-18 (3d Cir.1984) *cert denied*. ,, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). This *per se* rule is limited to several judicially created categories that are not implicated in this case. *See Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1489-90 & n. 14 (3d Cir.1985) (*per se* categories are horizontal and vertical price fixing, resale price maintenance, group boycotts, trying arrangements, and reciprocal dealing), *vacated on other grounds* , 475 U.S. 1105, 106 S.Ct. 1509, 89 L.Ed.2d 909 (1986).

antitrust theory and those claims ordinarily held violative of the Sherman Act was disturbing. *Northeast Women's Center, Inc. v. McMonagle*, 624 F.Supp. 736, 740 (E.D.Pa.1985). Although not conclusive on the question of whether or not the Sherman Act was applicable, "this essential dissimilarity ... [did] constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37, 81 S.Ct. 523, 528-29, 5 L.Ed.2d 464 (1961). Consequently, the court expressly cautioned the plain-tiff that "[p]roof of injury to the plaintiff's business will be deemed insufficient absent further proof that such injury amounted to an unreasonable restraint on trade." *Northeast Women's Center, Inc. v McMonagle*,, No. 85f-4845, slip op. at 7 (E.D. Pa. Feb. 12, 1987) [Available on WESTLAW, DCT database]. The plaintiff's case now over, it is clear to the court that its warning has gone unheeded. The plaintiff has rested its claim for an antitrust recovery entirely on proof that the defendants seek to destroy

its abortion business. As this court forewarned the plaintiff on February 12, 1987,[4] this proof alone is not proof enough.

The goal of the federal antitrust laws generally is the enhancement of competition. Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d. 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978). The goal of Section 1 specifically is the prevention of any diminution of competition in the marketing of goods and services. *K*almanovitz v. G.Heileman Brewing *Co.*, 769 F.2d 1252, 156 (3d Cir.1985). Although an individual business has standing to sue under the Sherman Act for injuries it sustained to its own business, the antitrust laws were not enacted simply to protect such discreet, individual business interests. "The antitrust laws were enacted for the protection of *competition*, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)(emphasis added)(quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962).

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[4] *Northeast Women's Center, Inc. v McMonagle*,, No. 8504845, slip op. at 7 (E.D.Pa. Feb. 12, 1987) [Available on WESTLAW, DCT database] (memorandum and order denying defendants' motion for summary judgment).

[3,4] Accordingly, an antitrust plaintiff is required to prove more than just its business' injury. To recover under Section 1, a plaintiff must prove that the defendants' conspiracy produced adverse, anti-competetive effects within relevant product and geographic markets.[5] *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1489 (3d Cir.1985), *vacated on other grounds*, 475 U.S. 1105, 106 S.Ct. 1509, 89 L.Ed.2d 909 (1986); *Martin B. Glauser Dodge Co.*, 570 F.2d at 81. Accord Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 375 (3d Cir.1985). The plaintiff has the burden of demonstrating that the defendants' conspiracy, in some substantial way, "either did or could effect interstate commerce by controlling market prices, imposing undue limitations on competitive conditions, or unreasonably restricting competitive opportunity." Sitkin Smelting & Refining Co. v.FMC Corp., 575 F.2d 440, 447 (3d Cir.),

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5 To sustain a cause of action under § 1 in this circuit, a plaintiff must prove (1) that the defendants conspired among each other; (2) that the conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects and the conduct pursuant to the conspiracy were illegal; and (4) that the plaint-iff was injured as a proximate result of that conspiracy. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 71, 81 (3d Cir. 1977), *cert. denied* , 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978).

cert. denied, 439 U.S. 866, 99 S.Ct. 191, 58 L.Ed.2d 176 (1978). Accord Apex Hosiery Co. v Leader, 310 U.S. 469, 493 n. 15, 60 S.Ct. 982, 992 n. 15, 84 L.Ed. 1311 (1940) (Sherman Act designed to prevent restraints of trade which have significant effect on business competition).

[5] Competition within a particular industry is not necessarily injured merely because one competitor in the industry sustains a loss of business. An injury to *competition* within an industry may be proven by an appreciable reduction in the number of competitors or by some other outward sign of adverse effects on competitive conditions. "[B]ut adverse impact is simply not shown by a loss of profits, or even by the total elimination of one competitor." Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 491 F.Supp. 1199, 1213 (D.Hawaii 1980), *aff'd*, 732 F.2d 1403 (9th Cir.1984). An antitrust plaintiff must demonstrate that the defend-ants' conduct had "some anti-competitive effect beyond the plaint-iff's own loss of business." Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 450 (9th Cir.1979); Gough v. Rossmoor Corp., 585 F.2d 381, 386 (9th Cir.1978), *cert. denied*, 400 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Thus, to prove an antitrust violation in

this case, the plaintiff had to demonstrate an actual anti-competitive impact on the providing of abortion services within the relevant market area. See Tunis Bros. Co., 763 F.2d at 1490.

The plaintiff here has introduced no such evidence.[6] There has been no evidence even suggesting that the defendant's protest activities at the Center have diminished competition within the plaintiff's market; no evidence of an appreciable reduction in the number of competitors, no evidence of any other outward sign indicating an adverse effect on competitive conditions. The plaintiff has made no attempt to define the relevant service market allegedly affected, nor has the plaintiff characterized or quantified the alleged anti-competitive damage. The plaintiff has failed to even establish for the jury who all its competitors are.

The plaintiff in this case sought to make new law, pursuing an antitrust recovery through an unorthodox application of the Sherman Antitrust Act. Due to the apparent

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6 *Cf.Klor's v. Broadway-Hale Stores, Inc* ., 359 U.S. 207, 209, 79 S.Ct. 705, 707, 3 L.Ed.2d 741 (1959) (evidence at trial indicated that plaintiff had been seriously handicapped in its ability to compete and had been caused great loss of profits, goodwill, reputation and prestige).

complexity of the facts and the imprecision in the complaint, the court allowed the plaintiff the benefit of the doubt and permitted the Center to proceed with its proof.[7] However, the mere fact that the plaintiff attempts a novel approach does not afford it special treatment under the antitrust laws. It is bound by the same elements of proof as any other antitrust plaintiff; the requirements for recovery are neither enhanced nor relaxed.

[6] Having heard the plaintiff's case, the court concludes that the plaintiff has failed to state a prima facie claim under 15 U.S.C. § 1 as defined by the elements of that cause of action. Therefore, the defendants' motions for directed verdicts will be granted as to the plaintiff's antitrust count. This ruling in no way circumscribes the jury's authority to award damages against the defendants under the plaintiff's remaining three theories. Finding that the plaintiff has failed to meet its burden of proof, the court is not called

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7 *Cf. Barr v. National Right to Life Comm., Inc..*, 1981-82 Trade Cas. (CCH) ¶ 64,315 (M.D. Fla. July 27, 1981). *Cf. also Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 447 (3d Cir.) ("Conduct not within the scope of the [Sherman Antitrust Act] is not made into an antitrust violation by accompanying conduct which is reprehensible under some moral or ethical standard or even illegal under some law."), *cert. denied*, 439 U.S. 866, 99 S.Ct. 191, 58 L.Ed.2d 176 (1978).

upon to address the question of whether the First Amendment would have denied the plaintiff a recovery in the event it had established an antitrust cause of action.[8] Consequently, no opinion on this issue is expressed.

II. RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT CLAIMS

The plaintiff's second count alleges that the defendants, through a pattern of racketeering activity, injured the Center in violation of the federal RICO statute. For predicate acts, the plaintiff lists robbery and Hobbs Act extortion, both of which qualify as racketeering activity pursuant to 18 U.S.C. § 1961(1).

The declared purpose of Congress is enacting the RICO statute was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged

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8 The First Amendment does limit the application of the Sherman Act. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). Whether the First Amendment would have restricted or precluded a damage award in this case is unaddressed by the court.

in organized crime." *United States v Turkette*, 452 U.S. 576, 589, 101 S.Ct. 2524, 2531, 69 L.Ed.2d 246 (1981). In addition to its criminal penalties, the statute provides a private cause of action to recover treble damages for injuries sustained as a result of criminal racketeering activity. *See* 18 U.S.C. § 1964(c) (1982).

As its application in this action clearly evidences, however, RICO has evolved into a creature much different from that envisioned by its creators. *See generally Comment, What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 Am.U.L.Rev. 821 (1986). Instead of a weapon for derailing the activities of "the archetypal, intimidating mobster", the RICO statute has become a method for redressing virtually all means of wrongdoing. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3287, 87 L.Ed.2d 346 (1985). When recently given the opportunity to refocus RICO, the United States Supreme Court declined to do so. "[T]his defect-if defect it is-is inherent i the statute as written, and its correction must lie with Congress." *Id.* Consequently, it cannot be said that RICO's application in this case is legally precluded.

The RICO statute makes four types of conduct illegal.[9] As to each type, the plaintiff must establish the existence of an "enterprise", an ongoing organization-composed of members function-ing as a continuing unit-that has "an existence separate and apart from the pattern of [racketeering] activity in which it engages." 18 U.S.C. § 1962 (1982). *See United States v. Local 560 of the Internt'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers*, 780 F.2d 267, 290 (3d Cir.1985). The plaintiff must also establish a pattern of racketeering activity composed of the commission of at least two predicate acts of robbery or extortion within a ten-year period. 18 U.S.C. § 1962 (1982). *See* 18 U.S.C. § 1961(5) (1982). The court first turns to the plaintiff's robbery and extortion allegations.

9 *See* 18 U.S.C.§ 1962(a), (b), (c), & (d) (1982). As the plaintiff explained during the directed verdict hearing, a RICO recovery is sought only under § 1962(c) and (d).

Under Pennsylvania law,[10] a person is guilty of robbery if, in the course of committing a theft, he physically takes or removes property from the person of another by force however slight. 18 Pa. Cons.Stat. Ann. § 3701(a)(1)(v) (Purdon 1983). The plaintiff argues that it has proven that, on August 10, 1985, a number of defendants entered the Center and, through the use of physical force, removed property from the plaintiff's offices. The plaintiff further argues that, having used force against its employees in the unlawful removal of its property, the defendants committed a robbery.

A person violates the Hobbs Act, 18 U.S.C. § 1951(b)(2) (1982), if he induces his victim to part with property through the use of fear and, in so doing, adversely affects interstate commerce. *See Local 560*, 780 F.2d at 281. The Hobbs Act applies not only to completed extortions, but to attempted extortions and conspiracies to commit extortion as well. 18 U.S.C. § 1951(a) (1982). For Hobbs Act purposes,

10 The defendants assert that the appropriate definition of robbery for RICO purposes is that adopted by the State of New York. *See United States v. Nedley* , 255 F.2d 350, 355 (3d Cir.1958). The defendants' case relates to robbery under the Hobbs Act, not the state law robbery the plaintiff alleges here. Moreover, the court finds no material differences between the Pennsylvania and New York formulations.

the term "property" includes intangible property interests such as the right to make business decisions free from wrongfully imposed outside pressure. *See Id.* at 281-82.

The plaintiff argues that it has established prima facie evidence that the defendants conspired to and did attempt three seperate extortions. According to the plaintiff's theories, the defendants, through the use of fear instilled by their protest activities, attempted and conspired to induce (1) the Center, (2) its employees, and (3) its patients to part with intangible property interests. Specifically, the defendants allegedly attempted and conspired to extort from the Center its property interest in continuing to provide abortion services, from the employees their property interest in continuing their employment at the Center, and from the patients their property interest in entering into a contractual relationship with the Center.[11]

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11 The plaintiff's extortion theories neccessarily raise a novel question regarding the predicate acts requirement of RICO: if the plaintiff can demonstrate that it was injured as a result of the defendants' conduct, must it be the *direct* victim of the conduct to have standing? In this case, the plaintiff is only the victim of the alleged extortionate acts under the first theory. Under the second theory, the employees are the victims and, under the third theory, the patients are the victims. But the plaintiff argues that, from all three alleged extortions, it sustained a compensable

injury to its business. Even though it was not the direct victim under theory two or three, the plaintiff seeks to send these alleged extortions to the jury as predicate acts for its RICO recovery.

The language of the statute makes no requirement that the plaintiff be the victim of the predicate acts so long as the plaintiff is injured as a result of the acts. Section 1964(c) establishes a civil remedy for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1982) (emphasis added). Under § 1962(c) and (d), the focus is directed at the defendant's conduct rather than the plaintiff's injury. The provisions make no mention of who must be victimized in order to recover. Similarly inconclusive are the definition provisions. Section 1961(1) defines "racketeering activity" as "*any* act or threat" involving robbery or extortion. 18 U.S.C. § 1961(5) defines "pattern of racketeering activity" as" two acts of racketeering activity" without regard to victim.

The Supreme Court's two recent decisions on the statute suggest that the Act be interpreted broadly and that Congress be left to restrict any overbreadth. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), the Court rejected the Second Circuit's requirement that a RICO plaintiff prove a "racketeering injury" seperate and distinct from the harm it sustained by the predicate acts themselves. The Court discarded the limitation by observing that the statute makes no such requirement. *Id.*, 105 S.Ct. at 3286. In *American Nat'l Bank & Trust Co. v. Haroco, Inc.* , 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985) , the Court rejected a similar requirement by the Seventh Circuit with an admonition that the requirement "suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in [Sedima]." *Id.* 105 S.Ct. at 3292.

In light of the Supreme Court's direction that the Act be read as written, this court has canvasse the statute for a requirement that the RICO plaintiff be the direct victim of the alleged predicate acts. The

As noted above, the plaintiff rests its claims of extortion on characterizing the defendants' protest activities as violative of the Hobbs Act. However, in assessing the applicability of the Hobbs Act to the defendants's conduct, the precepts of the Constituion must be kept in mind. Resting on the "highest rung" in the heirarchy of First Amendment values, free speech is accorded special praotection under the Constitution. Connick v Myers, 461 U.S. 138, 145 (1983). It guarantees "the right of every citizen to reach the minds of willing listeners," Heffron v International Soc'y for Krishna Consciousness, Inc.,452 U.SA. 640, 655 (1981), in order to assure the :"unfettered interchange of ideas for the bringing about of political and social changes, "Roth v. United States, 354 U.S, 476, 484 (1957).

Attempts to persuade another to action are clearly within the scope of the First Amendment. Thomas V. Collins, 323 U.S. 516, 537 (1945). The fact that the defendants' speech was intended to persuade patients to forego their abortions or

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court has found no such requirement. Moreover, the court notes that the plaintiff has offered evidence that irrespective of the actual victim, the Center has experienced a resultant injury. Consequently, the alleged extortionate con-duct directed to the employees and the patients will go to the jury as predicate acts in support of the plaintiff's RICO claim.

employees to leave their employment at an abortion-providing clinic does not, in itself, corrupt the speech nor diminish its protection under the Constitution. See Thornhill v Alabama, 310 U.S. 88, 99 (1940). Such pure speech activities cannot support a claim of extortion. Similarly, peaceful picketing, leafletting, and demonstrating enjoy the same freedom of expression. E.g.,Organization for a Better Austin v. Keefe,402
U.S. 415 (1971); Edwards v. South Carolina, 372 U.S. 229 (1963); Thornhill v. Alabama, 310 U.S.88 (1940). That this expression was designed to have an "offensive" or coercive" effect is of little significance provided that the manner of expression retained its peaceful nature. NAACP v. Claiborne Hardware Co. 458 U.S.886, 911 (1982).

The First Amendment will not, however, offer a sanctuary for violence. "No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." Claiborne Hardware Co.,458 U.S. at 916. The forcible, unauthorized entry into the Center's facilities is not protected conduct. Neither can the breaking of an automobile tail light or the inflicting of bodily injury scurry behind the First Amendment for refuge. As to

these activities, the plaintiff will encounter no constitutional hurdle.

But to establish extortionate conduct, the plaintiff must offer proof of such unlawful activity. It must prove more than the offensive or coercive nature of a defendant's protest activities. It also must prove more than a defendant's intent that the Center cease providing abortions, that its employees resign their abortion-related posts, or that its patients cancel their appointments. Only non-peaceful acitivity, falling outside the parameters of protected conduct can form the basis of a claim for extortion.

Having reviewed the plaintiff's predicate act allegations, the court now assesses the plaintiff's success in stating a prima facie case for a pattern of racketeering activity. With respect to robbery, the plaintiff alleges only one incident occurring on August 10, 1985. The plaintiff has introduced evidence that on thgat date the Center was entered by defendants Joseph P. Wall, Roland Markum, Howard Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen Jones, Susan Silcox, Paul C. Armes, Walter G. Gies, John J. O'Brien, and Kathy Long. The plaintiff has also presented evidence that those entries were unauthorized. Further, the plaintiff has

brought in evidence suggesting that, following those entries, certain medical tubes, bottles, and knobs were missing. The court finds this evidence sufficient to state a prima facie case of robbhery as to defendants Joseph P. Wall, Roland Markum, Howard Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen Jones, Susan Silcox, Paul C. Armes, Walter G. Gies, John J. O'Brien, and Kathy Long.

With regard to the extortion allegations, there is evidence before the jury of four unauthorized entries into the Center's facilities. This activity does not constitute protected First Amendment expression. The plaintiff's evidence intimates that patients and employees present during those entries were placed in fear by the nature and manner of the incidents. There is also evidence that, if believed and taken in the totality of the attendant circumstances, would suggest that the occurrence of these entries would cease if the Center surrendered its abortion-providing services. The court finds that this evidence states a prima facie case for extortion as to the following defendants: Michael McMonagle, Dennis Sadler, Deborah Baker, Thomas Herlihy, Anne Knorr, Robert Moran, Joseph P.Wall, Roland Markum, Howard Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen

Jones, Susan Silcox, Paul C.Armes, Walter G. Geis, John J. O'Brien, Patricia Walton, Kathy Long, Helen Gaydos, Donna Andracavage, Juan Guerra, Margaret Caponi, Mary Bryne, Linda Corbett, Thomas McIlhenny, and Patricia McNamara.

A pattern of racketeering activity requires the commission of two predicate acts within a ten-year period. 18 U.S.C. § 1961(5) (1982). In this case, the plaintiff alleges four p redicate acts: the August 10 robbery, the extortion of the Center, the extortion of its employees, and the extortion of its patients. The "pattern" requirement is met only as to those defendants who have been involved in at least two of these four acts. The court has earlier concluded that for each defendant who entered the Center's offices, there was sufficient evidence to go to the jury on each of the three extortions. Consequently prima facie evidence of a pattern of racketeering activity has been presented with respect to: Michael McMonagle, Dennis Sadler, Deborah Baker, Thomas Herlihy, Anne Knorr, Robert Moran, Joseph P. Wall, Roland Markum, Howard Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen Jones, Susan Silcox, Paul C. Armes, Walter G. Gies, John J. O'Brien, Patricia Walton, Kathy Long, Helen Gaydos, Donna Andracavage, Juan

Guerra, Margaret Caponi, Mary Bryne, Linda Corbett, Thoms McIlhenny, and Patricia McNamara.

The plaintiff 's pattern evidence now defined, the court next turns to the two provisions of the RICO statute under which the plaintiff seeks its recovery. To state a violation of 18 U.S.C. § 1962(c), the plaintiff must prove that a defendant, who was associated with or employed by the enterprise conducted or participated in the activities of the enterprise by personally committing two acts of robbery or extortion. 18 U.S.C. § 1962(c) (1982). The court concludes that, considering the evidence of enterprise in the case, the jury is entitled to deliberate the claims under § 1962(c) that apply to each defendant for which a pattern of racketeering activity has been established. As listed above, these defendants are Michael McMonagle, Dennis Moran, Joseph P. Wall, Roland Markum, Howard Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen Jones, Susan Silcox, Paul C. Armes, Walter G. Gies, John J. O'Brien, Patricia Walton, Kathy Long, Helen Gaydos, Donna Andracavage, Juan Guerra, Margaret Caponi, Mary Bryne, Linda Corbett, Thomas McIlhenny, and Patricia McNamara. The claims against the other defendants, John Stanton, Linda

Hearn, John Connor, and Pasquale Varallo, are insufficient and their verdicts under § 1962(d) must be directed.

The plaintiff also seeks a RICO Recovery under 18 U.S.C. § 1962 (d) which declares it unlawful for any person to conspire to violate § 1962(c). 18 U.S.C. § 1962 (d) (1982). From this court's reading of the law in this area, there are at least two legal concerns that encumber the plaintiff's right to a full recovery under its § 1962 (d) theory. First, by its terms, the RICO conspiracy provision applies only to those defendants who conspire to further the activities of the enterprise through the commission of two racketeering acts. As a consequence, toi fall within the scope of the conspiracy provision in this case, a defendant charged under § 1962(d) must be shown to have conspired intentionally, not just to trespass inside the Center's offices, but also to commit two acts of robbery or extortion.

Second, the Free Assembly Clause of the First Amendment places a heavy burden on the plaintiff's attempt to impose conspiracy liability. The Supreme Court has recognized that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," and that "by

collective effort individuals can make their views known, when, individually, their voices would be faint or lost." Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 294 (1981). Accordingly, liability imposed for one's involvement with others--"guilt for association"--conflicts sharply with the precepts of the First Amendment. See Claiborne Hardware Co., 458 U.S. at 925.

Clearly, a person may always be held civilly liable for the consequences of his unlawful, violent acts. But a "massive and prolonged effort to change the social, political, and economic structive . . . cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." Id. at 933. For civil liability to arise by reason of association alone, "it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." Id. at 920.

In the context of this action, the plaintiff has alleged robbery and extortion as the illegal aims. Consequently, the plaintiff bears the burden of proviing that each defendant charged with conspiracy under 18 U.S.C. § 1962 (d) had specifically intended to accomplish those illegal aims. The

only defendants the jury could possibly find liable under this section are those twenty-five defendants who actually entered the Center and Ms. Walton and Corbett. Therefore, as to the remaining four defendants, the plaintiff's § 1962(d) RICO count cannot comport with the dictates to be. With respect to those defendants, the verdict will be directed.

III. TRESPASS CLAIMS

The plaintiff's first pendent claim charges each of the thirty-one remaining defendants with common law trespass to land. Amended Complaint at § 88. Under Pennsylvania law, "(o)ne who intentionally enters land in the possession of another without a privilege to do so is liable . . . to the possessor of the land as a tresoasser . . . ." Kopka v. Bell Telephone Co., 371 Pa. 444, 91 A.2d 232, 235 (1952) (quoting Restatement (First) of Torts § 164 (1934). Similarly, "one who authorizes or directs another to commit an act which constitutes a trespass to another's land is himself liable as a trespasser to the same extent as if the trespass were committed directly by himself. . . ." Id. Actions for trespass to land were created at common law to redress invasions of a person's right to the exclusive use and possession of his property. Hennigan v. Atlantic Refining Co., 282 F. Supp.

667, 669 (E.D. Pa. 1967) aff'd, 400 F.2d 857 (3d Cir. 1968), cert. denied, 395 U.S. 904 (1969). Essential to maintaining such an action is that the complainant in fact have the right to exclusive use and possession of the property at issue.

The plaintiff's trespass count is analytically complicated by the relocation of the Northeast Women's Center during the pendency of this lawsuit. Prior to June 16, 1986, the Center was located on the third floor of a three-story office building at 9600 Roosevelt Boulevard in Northeast Philadelphia. Testimony during the plaintiff's case-in-chief revealed that the Center leased this office space from an uninterested third party. While at this location, the Center's offices were entered four times by a number of anti-abortion protesters. These entries occurred on December 8, 1984; August 10, 1985; October 19, 1985; and May 23, 1986. According to the testimony of the plaintiff's witnesses, these unauthorized entries, combined with the numerous other regular protest activites, prompted the Center's landlord to decline to renew the Center's lease. Consequently, the Center was forced to move.

On June 16, 1986, the Center moved into its present facility in an office building located off Comly Road in

Northeast Philadelphia. This office building is situated in the southeast corner of a parcel of land approximately 350 feet long and 215 feet wide. Also within this parcel, to the west of the office building, is a branch office of Mellon Bank. The remainder of the parcel of land, constituting the substantial majority of the property, is devoted to parking spaces and "driveways" leading out onto Comly Road.

The Director of Community Relations for the Center, Kate Strausser, testified that the majority of the 350-by-215 foot parcel was purchased by Comly Road Associates from the Philadelphia Authority for Industrial Development. This deed was introduced as "P-78". A smaller 75-by-200 foot portion of this property--the portion on which the office building housing the Northeast Women's Center now stands--was purchased by and is currently owned by L.P. Partnership. This deed was introduced as "P-79". The Northeast Women's Center leases the middle portion of this office building through an agreement with L.P. Partnership. To guard against the unauthorized entry of protestors it had experienced at 9600 Roosevelt Boulevard, the Center equipped its new offices with an elaborate security system. As of this date, there have been no unauthorized entries at the Comly Road location.

In its claim for trespass, the plantiff seeks both retroactive relief in the form of money damages and prospective relief in the form of a permanent injunction. The claim for retroactive relief includes damages for the repair or replacement of desterilized, destroyed, or otherwise damaged medical equipment, the expenses incurred in moving the Center to its new location, and the costs of the security systems and security guards. The claim for prospective relief seeks an injunction limiting the number of protesters, restricting them to a certain location, and limiting the manner of their demonstrations. Due to the number of defendants peripherally named in this count, the court has carefully scrutinized the facts of this case in light of the elements of common law trespass.

It is clear to the court that the plaintiff has the right to exclusive use and possession of that portion of the office building it leased at 9600 Roosevelt Boulevard and to that portion of the officed building it is now leasing from L.P. Partnership at Comly Road. The plaintiff's right to recover under common law trespass for the defendants' unauthorized entry onto all other areas of 9600 Roosevelt Boulevard or all other areas of the 350-by-215 foot Comly Road parcel is far

from clear. The plaintiff may be entirely correct that the defendants' presence immediately outside its offices constitutes a trespass. The plaintiff may also be correct that the First Amendment would not shield the defendants from liability under the free speech clause. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980): Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972). But the plaintiff cannot, however, assert these trespass claims with respect to property it does not possess. As to any such trespass, the Northeast Women's Center is not the real party in interest.

This reasoning is particularly critical with regard to the dimensions of the prospective injunctive relief the plaintiff seeks at its Comly Raod location. By the plaintiff's own witness it was established that L.P. Partnership owns the office building and the property immediately surrounding the office building, and Comly Road Associates owns the remainder of the land. Neither L.P. Partnership nor Comly Road Associates is a plaintiff in this action. Thus, although the Northeast Women's Center is the proper party to raise claims for trespass to its own suite of offices, it cannot seek relief for the trespass to property it does not possess. Irrespective of whether the plaintiff can prove that neither L.P.

Partnership nor Comly Road Associates consents to the defendants' continuing presence on their land, the plaintiff's recovery--and, thus, it's cause of action--is limited to land it possesses.

In view of this determination, the court concludes that only claims of trespass to the Northeast Women's Center's suite of offices may go to the jury in this case. The jury is entitled to deliberate on claims that (1) a defendant personally trespassed on the Center's property, or that (2) a defendant directed another person to trespass on the Center's property. After reviewing the plaintiff's evidence in light of this ruling, the court will grant the following defendants' motions for directed verdicts on the trespass count: John Stanton, Linda Hearn, John Connor, and Pasquale Varallo.

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS CLAIMS

The plaintiff's final claim is the pendent count for intentional interference with contractual relations. The plaintiff alleges that the defendants have interfered with the existing employment contracts that it maintains with its employees. To succeed on this theory under Pennsylvania law, the plaintiff

must prove that the defendants (l) intentionally and improperty interfered with the performance of a contract between the Center and an employee and (2) that such interference resulted in the employee's failure to perform the contract. Adler, Barish,. Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393, A.2d ll75, ll83 (l978), appeal dismissed and cert. denied 442 U.S. 907 (l979((adopting Restatement (Second) of Torts § 766 (1979)).

A prima facie case for this tort has been stated with respect to the emplyment contracts the Center maintained with its previous administrator Mary Banecker and with its outgoing Director of Community Relations, Kate Strausser. The plaintiff asserts that, as a result of the defendants' activities, it was forced to outfit its facilities with a security system. For the reasons set forth in the preceding discussion of extortion, this claim will go to the jury only as against the twenty-five defendants who entered the Center and Ms. Walton and Corbett.

An order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.

C.A. No. 85-4845

v.

MICHAEL McMONAGLE, DENNIS SALDER,
DEBORAH BAKER, THOMAS HERLIHY
JOHN STANTON, ANNE KNORR,
ROBERT MORAN, JOSEPH P. WALL,
ROLAND MARKUM, HOWARD WALTON'
HENRY TENAGLIO, STEPHANIE MORELLO,
ANNEMARIE BREEN, ELLEN JONES,
SUSAN SILCOX, PAUL C. ARMES,
WALTER G. GIES, JOHN J. O'BRIEN,
PATRICIA WALTON, KATHY LONG,
HELEN GAYDOS, DONNA ANDRACAVAGE,
JOAN GUERRA, LINDA HEARN,
;JOHN CONNOR, MARGARET CAPONI,
MARY BRYNE, LINDA CORBETT
THOMAS McILHENNY, PASQUALE VARALLO
AND PATRICIA McNAMARA

ORDER

AND NOW, this 8TH day of May, 1987, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. With respect to the plaintiff's Antitrust count, the motions for directed verdict are GRANTED AS TO ALL DEFENDANTS.

2. With respect to the plaintiff's Racketeer Influenced and Corrupt Organizaitons Act count the motions for directed verdict of JOHN STANTON, LINDA HEARN, JOHN CONNOR, AND PASQUALE VARALLO are GRANTED. All other motions for directed verdict on this count are DENIED.

3. With respect to the plaintiff's common law trespass count the motions for directed verdict of JOHN STANTON, LINDA HEARN, JOHN CONNOR, AND PASQUALE VARALLO are GRANTED. All other motions for directed verdict on this count are DENIED.

4. With respect to the plaintiff's common law intentional interference with contractual relations count the motions for directed verdict of JOHN STANTON, LINDA HEARN, JOHN CONNOR, and PASQUALE VARALLO

are GRANTED. All other motions for directed verdict on this count are DENIED.

BY THE COURT:

/s/ JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.

CIVIL ACTION

V.

MICHAEL McMONAGLE, DENNIS SADLER,

DEBORAH BAKER, THOMAS HERLIHY,

JOHN STANTON, ANNE KNORR,

ROBERT MORAN, JOSEPH P. WALL,

ROLAND MARKUM, HOWARD WALTON,

HENRY TENAGLIO, STEPHANIE MORELLO,

ROLAND MARKUM, HOWARD WALTON,
HENRY TENAGLIO, STEPHANIE MORELLO,
ANNEMARIE BREEN, ELLEN JONES,
SUSAN SILCOX, PAUL C. ARMES,
WALTER G. GIES, JOHN J. O'BRIEN,
PATRICIA WALTON, KATHY LONG,
HELEN GAYDOS, DONNA ANDRACAVAGE,
JOAN GUERRA, LINDA HEARN
JOHN CONNOR, MARGARET CAPONI,
MARY BRYNE, LINDA CORBETT,
THOMAS Mc;ILHENNY, PASQUALE VARALLO,
and PATRICIA McNAMARA :

NO. 85-4845

ORDER

AND NOW, this 8th day of May, 1987, whereas the names of Linda Corbett and Patricia Walton were inadvertently excluded from this court's grant of directed verdict on the trespass count, * it is ORDERED that the court's Bench Opinion of May 8, 1987 is AMENDED as follows:

1. Page 27, the sentence: "After reviewing the plaintiff's evidence in light of this ruling, the court will grant the following defendants' motion for directed verdicts on the trespass count: John Stanton, Linda Hearn, John Connor, and Pasquale Varallo" is amended to include the names Linda Corbett and Patricia Walton.

*See Bench Opionion at 18 nn.13 & 14

2. Paragraph 3 of the Order is amended to read:

" With respect to the plaintiff's common law trespass count the motions for directed verdict of JOHN STANTON, LINDA HEARN, JOHN CONNOR, PASQUALE VARALLO, LINDA CORBETT, and PATRICIA WALTON are GRANTERD. All other motions for directed verdict on this count are DENIED."

BY THE COURT:

/s/ JAMES McGIRR KELLLY J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC. CIVIL ACTION

V.--

MICHAEL McMONAGLE, et al. NO. 85-4845

MEMORANDUM AND ORDER

KELLY, J. FEBUARY 12, 1987

The plaintiff in this civil action is Northeast Women's Center, Inc. ("Center"), a Pennsylvania corporation engaged in the business of providing pregnancy testing,

gynecological care, counseling, and abortion procedures.[1] The forty-two individuals named as defendants are pro-life activists who have protested spiritedly against abortion both in front of and inside the Center. As a consequence of certain incidents which occurred during the course of the defendants' protest activities, the plaintiff has filed a civil complaint charging the defendants with conspiring to destroy the Center's business and property. Amended Complaint at para. 1. The plaintiff seeks recovery under three theories: a civil violation of the Racketeer influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C 1964; a civil violation

[1] In its complaint, the plaintiff avers that abortions account for approximately 35% of the Center's clients. Amended Complaint at para. 5.

of the Sherman Antitrust Act, 15 U.S.C. 1; and several claims involving common law torts.[1]

The original complaint was filed on August 20, 1985. On October 25, 1985, the court denied the defendants' Federal Rule 12 (b)6 motions to dismiss and, on June 12, 1986, the court denied the plaintiff's request for a temporary restraining order and/or preliminary injunction. The matter has been placed in the court's trial pool. Still pending are fifteen motions, six by the plaintiff and nine by the defendants. These motions will be addressed in four categories: motions on the pleadings, motions for summary judgment, objections to the United States Magistrate's discovery orders, and motions in limine.

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[1] The third count, styled "Pendent State Law Claims", charges the defendants with commission of six distinct common law torts: (1) intentional interference with contractual relations: (2) assault; (3) battery; (4) trespass; (5) intentional infliction of emotional distress; and (6) libel and slander. Amended Complaint at para. 88. As of this date, the plaintiff has abandoned its claims of assault, battery, and intentional infliction of emotional distress. Plaintiff's Consolidated Memorandum in Support of Plaintiff's Motions in Limine and in Opposition to Defendants' Motions in limine (Document # 110) at 1 n.1. The plaintiff has also announced that it "will not directly pursue claims for invasion of privacy." Id. As there is no pending claim in the amended complaint for invasion of privacy, what the plaintiff intends to abandon by this statement is unclear to the court.

I. MOTIONS ON THE PLEADINGS

In their answers, the defendants filed two counterclaims. The first counterclaim, alleges wrongful use of process in connection with the bringing of this law suit. The first counterclaim, premised on the same reasons as the first, seeks sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The plaintiff has moved to dismiss both counterclaims for failure to state a claim upon which relief can be granted. In response, the defendants have moved to strike the plaintiff's motion as untimely or, in the alternative, for summary judgment on the counterclaims.

The action for wrongful use of civil proceedings is governed by statute in Pennsylvania. 42 Pa. Cons. Stat. Ann. §8351 (Purdon 1982). One who initiates or continues a civil action against another is liable for wrongful use of process if (1) the action was brought or maintained in a grossly negligent manner or without probable cause (2) for an improper primary purpose, and (3) the proceedings were terminated in the defendants' favor. Id. Because this case has not yet gone to trial, there has been no opportunity for the proceedings to be terminated in the defendants' favor.

Consequently, the defendants' first counterclaim is unripe and will be dismissed.

Federal Rule 11 was enacted to re-emphasize the responsibilities of attorneys and to reinforce those obligations by imposing sanctions for failure to bear those responsibilities. See Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. The defendants have failed to offer any authority for their proposition that Rule 11 could serve as a cause of action independent from a substantive claim. Even in the event Rule 11 could be interpreted as the defendants urge, it, too, would be unripe. Treating the counterclaim as a motion for sanctions against the plaintiff, the court considers sanctions unwarranted on the basis of the defendants' papers and the motion will be denied.

II. MOTIONS FOR SUMMARY JUDGMENT

After unsuccessfully moving to dismiss the complaint for failure to state a claim and following further discovery, the defendants now seek summary judgment on each of the plaintiff's three counts.[1] Federal Rule 56(c)

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[1] The defendants' motions for summary judgment on the RICO, antitrust, and contractual interference claims are documents #116, 115, and 114 respectively. The plaintiff's consolidated response is document #120.

instructs a district court to enter summary judgment when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This rule provides the court with a useful tool when the critical acts are undisputed, facilitating the resolution of a pending controversy without the expense and delay of conducting a trial made unnecessary by the absence of factual dispute. Perterson v. Lehigh Valley Dist. Council, United Brotherhood of Carpenters & Joiners, 676 F.2d 81, 84 (3d Cir. 1982); Goodman v. Mead Johnson & Co.534 F.2d 566, 573 (3d Cir. 1976); cert. denied, 429 U.S. 1038 (1977). Disposing of a matter by summary judgment is inappropriate, however, where the evidence before the court reveals a genuine factual disagreement requiring submission to a jury. Anderson v. Liberty Lobby, Inc. ____, U.S.___, ___, 106 S. Ct. 2505, 2512 (1986). "[E]"ven if the preponderance of the evidence should appear to lie on the moving party's side, the court's function is not to decide issues of fact, but only to determine whether any issue of fact exists to be tried." Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981). Where a

material factual disagreement exists, a trial is necessary to reslove the conflict. Peterson, 676 F.2d at 84.

In conducting its analysis, the court must view all inferences in the light most favorable to the nonmoving party, Continental Ins. Co. v. Bodie, 682 F.2d 436, 428 (3d Cir. 1982), must resolve all doubts against the moving party, Hollinger V. Wagner Mining Equip. Co., 667 F.2d 402, 405 (3d Cir. 1981), and must take as true all evidence of the nonmoving party that conflict with that of the movant, Anderson, 106 S. Ct. at 2513. After applying these standards to the motions now pending, I am satisfied thast a genuine factual dispute exists as to each of the plaintiff's three counts.

Although the court agrees that the plaintiff's RICO claim is novel, I have previously ruled that conspiring to destroy a business engaged in interstate commerce by means of robbery and extortion constitutes a cognizable claim for relief under 18 U.S.C. 1964. See Northeast Women's Center, Inc. v. McMonagle, No. 85-4845, slip op. at 3-4 (E.D. Pa. Oct. 25, 1985). I disagree with the defendants that, by withdrawing its claim for lost revenue, the plaintiff has foreclosed its ability to demonstrate that it is a business engaged in interstate commerce. Moreover, the plaintiff has

offered sufficient facts which, if fully proved at trials and believed by a jury, would establish the predicate acts of robbery and extortion. Finally, that the plaintiff claims only increased costs to its business occasioned by the defendants' conduct does not eviscerate the plaintiff's RICO count. The increased cost of doing business, incurred by the plaintiff in its efforts to continue to provide its services over the defendants' protests, may constitute a proper business injury within the meaning of 18 U.S.C. 1964 (c).

The plaintiff's antitrust claim is equally novel but, like the RICO count, the court has already ruled that the plaintiff has stated a cognizable claim for relief. The defendants argue, however, that the plaintiff's abandonment of its claim for lost revenue bars the possibility for an antitrust recovery. Although this development further extends the plaintiff's already unusual antitrust theory, I am nevertheless inclined, on the weight of the facts asserted, to allow this claim to proceed to trial. At trial, however, the plaintiff will be expected to prove, by competent evidence, that the defendants' conduct constituted an actual, unreasonable restraint on trade or commerce. See II E.D. Kintner, Federal Antitrust Law, 9.1, 5 (1980). Proof of injury to the plaintiff's business will

To the extent the defendants seek to justify unlawfulk acts by an appeal to moral conviction, their defense is misplaced.

The Supreme Court of the United States has concluded that the constitutional right of personal privacy encomposses the abortion decision. Roe, 410 U.S. at 154. This position was specifically reaffirmed by the Court in 1983, Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 (1983), and again in 1986, Thornburgh, 106 S. Ct. at 2178.

Article III of the Constitution vests the judicial power of the United States in the Supreme Court and in such inferior courts as the Congress Chooses to establish. These inferior courts, of which of which this district is one, are absolutely duty-bound to follow the decisions of those courts retaining appellate jurisdiction over them. See H. Black, The Law of Judicial Precedents 10-11 (1912). Nothing about this duty is optional or discretionary. The sentiments of any individual judge notwithstanding, the pronouncements of the Supreme Court become the law of the land, a thing decided.

This court is entirely without authority to modify or otherwise reevaluate those rulings.[1]

As an alternative ground for introducing evidence of their beliefs on abortion, the defendants assert that this evidence is admissible for the purpose of proving motive or justification. Although offering proof of facts to establish motive or intent is generally recognized by the Federal Rules of Evidence, a threshold issue nevertheless remains. To be admissible at trial, the evidence the defendants propose to offer must be relevant. Fed. R. Evid. 402.

From what can be gleamed from their Memorandum of Law the defendants intend to introduce into evidence their moral objections to the plaintiff's choice of business. On the weight of that evidence, the defendants intend to argue to the jury that their moral objections afford a legal justification for their actions that may aleviate any otherwise appropriate civil liability. As a matter of law this position is indefensible.

The United States Court of Appeals for the Third Circuit has previously considered the precise argument

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[1] See United States ex rel Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971); 1 W. Blackstone, Commentaries *69.

offered by the defendants. In United States v. Malinowski, 472 F.2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973), a federal taxpayer had attempted to dramatize his opposition to the Vietnam War by filing an improper employee withholding form. In his defense, the taxpayer sought to argue that, because of his well-intentioned purpose in misfiling, he could not be held culpable under a criminal statute requiring "willful" conduct.

The court unanmously rejected the taxpayer's suggestion "that a member of society can be absolved of the responsibility for obeying a given law of the community, state, or nation if he can prove a sincere, abiding, and good faith objection to the direct or indirect object of [9] the law." Id. at 857. In the court's view, an individual'smotivation that he acted under a sincere belief that he was breaking the law for a reble cause could not be accepted as a legal defense for his actions. Id. at 858 (quoting United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970). See also United States v. Macintosh, 283 U.S. 605, 633 (1931) (Hughes, J., dissenting); Kahn v. United States, 753 F.2d 1208, 1215-16 (3d Cir. 1985).

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It is apparent to this court that the defendants entertain an honest and unwavering belief that abortion is morally wrong and should be legally condemned. However, specific constitutionally preserved avenues for changing existing laws are well-defined in this country. Public attitudes can be swayed through legitimate exercises of free speech and expression. Differing values can be instilled through the process of education. Lawmakers embracing the defenants' beliefs can be campaigned for, elected, and lobbied. Petitioners can challenge the Supreme Court to re-examine its position in light of new developments or new analysis.[1] The Constitution itself may even be amended.

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1 See R. McCloskey, The American Supreme Court 23 (1960) ("the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment.") See also Thornburgh v. American College of Obstetricians & Gynecologists, ___ U.S. ___, 106 S. Ct. 2169 (1986) (5-4 decision); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (6-3 decision); Roe v. Wade, 410 U.S. 111 (1973) (7-2 decision).

See generally O. W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1896):

> Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemnd by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore,

> The last time the defendants looked at the United States Constitution, it still did not provide the right of abortion. And although a majortiy of the Supreme Court have so determined, this does not prevgent the people of the United States from determining otherwise, not while feigning the pretext of a democracy .... The courts, as the traditional bastions of truth-finding, should not fear giving these defendants their day in court to defend their homes and life savings.

Id. at 2-3.

To the extent the defendants seek a reconsideration in this forum of the decision in Roe v. Wade, 410 U.S. 111 (1973), their intentions will be disappointed.

a legal cause. Restatement (Second) of Torts 774 (A) (1) (b) (1979). The plaintiff has averred that the defendants have interfered with the existing employment contracts it maintains with its employees by inducing them to resign. Further, the plaintiff has averred interference with the prospective contracts it might acquire with its clients by making its services inconvenient to obtain or undesirable because of the defendants' protests. Increased security expenses, personnel costs, and a lost lease qualify as potential grounds for a 774 (A) (1) (b) recovery.[1]

III. OBJECTIONS TO DISCOVERY ORDER

In an effort to expedite this matter to trial, the resolution of discovery disputes was referred to United States Magistrate Edwin Naythons. On November 7, 1986, Magistrate Naythons entered an order resolving all outstanding

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[1] Legal expenses and the repair or replacement of damaged property appear to fall outside the group of injuries intended to be recoverable under the Restatement. However, the court will allow the plaintiff an opportunity at trial to demonstrate the nexus between these injuries and the defendants' interference with the Center's contracts.

discovery motions. Both the plaintiff and the defendants have filed objections to the magistrate's order.

Rule 72(a) of the Federal Rules of Civil Procedure instructs the district court to modify or set aside any portion of the magistrate's order determined to be clearly erroneous or contrary to law. After a review of the parties' objections, the court will modify only one of the magistrate's rulings.

The defendants have objected to the magistrate's order denying them access to the names and addresses of the plaintiff's patients.[1] The magistrate considered the defendants' request for this discovery in light of the Supreme Court's recent decision in Thornburgh v. American College of Obstetricians & Gynecologists, U.S. , 106 S. Ct. 2169 (1986). In Thornburgh, the Court invalidated a Pennsylvania statute requiring a woman seeking an abortion to report certain information about herself which, when compiled, would make actual identification of the woman likely. The court held that, because such requirements "raise the spectre of public exposure and harassment of women who choose to exercise their personal, intensely

[1] The defendants' objection relates to defendants' interrogatories #7, 9, 17, 19, 21, 23, 25, 27, 30, 31, 58, and 65.

private right, with their physicians, to end a pregnancy[.] . . . they pose an unacceptable danger of deterring the exercise of that right." Id. at 2182. This conclusion, the magistrate ruled, required that the defendants' discovery be denied.

Although the court concurs in the magistrate's reasoning, the order's remedy is overbroad. An absolute prohibition on all patient information is unnecessary to ensure anonymity. Producing statistical information, cured of potentially identifying personal facts, does not offend the Constitution. Thus, the defendants are entitled to the city and state of domicile for each patient encompassed in the defendants' interrogatories.[1]

With respect to the plaintiff's discovery objections. I find nothing clearly erroneous or contrary to law in the Magistrate's order. The plaintiff objects to questions 26, 81, 97, and 113-16 as not relevant nor reasonably calculated to lead to relevant evidence. Question 26 asks

[1] In his memorandum, Magistrate Naythons intimated the possibility for such discovery. "Defendants here seek not only to discover the political subdivision and state of domicile of women who have chosen abortions, defendants have requested names and street addresses." Northeast Women's Center, Inc. v. McMonagle, No. 85-4845, slip op. at 7 (E.D. Pa. Nov. 7, 1986) (Discovery order of U.S. Magistrate Naythons).

whether any of the plaintiff's clients had ever been removed from the Center by means of emergency transportation. An affirmative answer to this question might provide the defendants with an alternate causation defense to the plaintiff's claims of business injury.

Question 81 requests a copy of the plaintiff's tax returns for each year of claimed business interference. Although the plaintiff produced those portions of its tax returns relating to its increased costs claims, the defendants have the right to test the accuracy and genuineness of those entries against the plaintiff's complete tax returns. The plaintiff correctly observes that its tax returns, ordinarily privileged and confidential, are properly discoverable when the plaintiff itself places its financial circumstances at issue. By alleging that the defendants have launched an illegal conspiracy to destroy its business and, as a consequence of that conspiracy, it has sustained economic injury, the plaintiff waived its privilege.

Question 97 seeks information on the counseling services provided to the plaintiff's clients. Questions 113-116 ask whether the plaintiff has ever been named as defendant in any malpractice action. Like Question

26 above, answers to these questions might offer a causation defense to the defendants and, therefore, could lead to relevant admissible evidence.

IV. MOTIONS IN LIMINE

Of the eight pending motions in limine filed by the parties, the plaintiff's request to preclude evidence of justification or motive is central to the conduct of this trial. The plaintiff seeks the court to instruct the defendants not to offer evidence of their beliefs regarding abortion or to testify that those briefs constituted the motivation for their actions. The plaintiff argues that such evidence would not constitute a legal justification for their actions and, therefore, is not relevant to this case.

The defendants vigorously object. They contend that their beliefs are the sine qua non of their conduct and that they must not be precluded from asserting the defense of justification. They argue that it is the plaintiff who "has chosen to litigate the abortion issue". Defendants' Answer to Plaintiff's Motion to Preclude Justification Defense at 2. The defendants have stated their intentions clearly:

be deemed insufficient absent further proof that such injury amounted to an unreasonable restraint on trade.

Finally, the defendants seek summary judgment on the plaintiff's claim for intentional interference with contractual relations. The Second Restatement of Torts[1] recognizes recovery under this tort for any pecuniary loss resulting from as third party's failure to perform under a contract allegedly interfered with by the defendants. Restatement (Second) of Torts 776 (1979). The defendants contend that the plaintiff's asserted damages--security expenses, loss of lease, legal expenses, increased personnel expenses, and the repair or replacement of damaged property--can[4] not qualify as losses resulting from failure to perform under the contract. At least as to some of these asserted damages, the court disagrees.

The plaintiff is entitled to compensation for all consequential losses for which the contractual interference was

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1 The Restatement's formulation of the common law tort of intentional interference with contractual relations has been adopted by the Supreme Court of Pennsylvania. See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1181 (1978), appeal dismissed and cert. denied, 442 U.S. 907 (1979).

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However, the defendants may have instead chosen to reject these legitimate means for change and to pursue their objetives through civil and criminal misconduct. Furthermore, they sek to premise a legal immunization for their actions on an appeal to morality. This reasoning is flawed. it is certainly true that to act as one feels morally compelled to act is within an individual's prerogative. it is equally true that being morally right is no excuse for being civilly wrong. The plaintiff has a protected right to own and enjoy its business and property. if the defendants wrognfully damaged that property, they are civilly liable to the plaintiff notwihstandig thir noble intentions.[1]

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nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law . . . . No one will deny that wrong statutes can be and are enforced and we should not all agree as to which were the wrong ones. Id. at 460.

11 Mohandas Gadhi, perhaps the most lauded proponent of civil disobedience in history, denounced the resort to violence as a means of protest:

[I] discovered in the earliest stages that pursuit of truth did not admit of violence being inflicted on one's opponent, but that he must be weaned rom error by patience and sympathy. For what appears to be truth to the one may appear to be error to the other.

Gandhi, A Plea for the Severest Penalty upon Conviction for Sedition, in The Law As Literature, 459-

The defendants propose no other proper theory for why evidence of their beliefs could possible be relevant at trail.[1] Consequently, the plaintiff's motion to preclude evidence of justification or motive will be granted. Counsel for the defendants may, in their opening statement, explain to the jury the circumstances surrounding the defendants'

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60 (E. London ed. 1960) (quoted in McEwen, The Defense of Justification and its use by the Protestor: A focus on Pennsylvania, 91 Dick. L. Rev. 3, 8 (1986).

In his recent article on the justification defense, Judge Stephen McEwen notes that six reported state court decisions have addressed the proffered defense in the context of pro-life protests. In each case, the proported defense was rejected as improper. McEwen, supra at 32-34. Although each of these cases involved Criminal Prosecutions, their reasoning is enlightening... in the civil context as well. See Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1077-82 (Alaska 1981); Gaetano v. United States, 406 A.2d 1291, 1292-95 (D.C. 1979); People v. Krizka, 93 Ill. App.3d 101, 416 N.E. 2d 1209, 1210-12 (1981);(1980); Sigma Reproductive Health Center v. State, 297 Md. 660, 467 A. 2d 483, 490-98 (1983); State v. Horn, 126 Wis. 2d 447, 377 N.W. 2d 176, 180 (1985).

[1] The defendants also assert that evidence of motive is relevant to refute the existence of anticompetitive intent. See Franklin Music Co. v. American Broadcasting Cos., Inc., 616F.2d 528, 541-42 (3d Cir. 1979). This question was addressed, and resolved, in the October 25, 1985 memorandum. Northeast Women's Center, Inc v. McMonagle, No. 85-4845, slip op. at 11-12 (E.D. Pa. Oct. 25, 1985). Lastly, the defendants offer enidence of their views as a truth defense to the plaintiff's defamation claims. To the extent such an asserted defense is inconsistent with the Supreme Court's views on abortion, it is disallowed

presence on the plaintiff's property.[1] Counsel may not extract testimony or introduce tangible evidence of the defendants' beliefs on abortion absent a prior demonstration of the relevance of the proposed evidence. Counsel may not argue or imply to the jury, in either an opening statement or closing argument, that the defendants' beliefs offer any type of legal defense to the pending civil claims.

The plaintiff has filed three further motions in limine. First, the plaintiff seeks an order precluding the defendants and their counsel from referring to the Center or its staff in inflamatory language.[2] This motion will be granted. As noted above, defense counsel will be afforded the opportunity to relay to the jury that the defendants object to abortion. Further references to abortion, inflamatory in nature

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[1] The plaintiff has offered to stipulate that the defendants oppose abortion and that this opposition constituted the reason for their actions. Plaintiff's Consolidated Memorandum in Support of Plaintiff's Motions in Limine and in Opposition to Defendants' Motion in Limine (Document #110) at 3, n.2. Conveying the facts in this proposed stipulation to the jury is permissible.

[2] In the motion, the plaintiff lists such terms as "murder", "killing", or "baby-killing" as reference to abortion. This list, of course, is merely illustrative of the type of language the plaintiff fears. The court reads the plaintiff's motion as encompassing all such related references.

and designed to suggest a justification defense, are expressly precluded.

Second, the plaintiff seeks an order precluding the defendants and their counsel from introducing evidence of any basis for their opposition to the center's operations other than their personal views on abortion. This motion will be granted in part. The defendants are precluded from inquiring into subjects that ar rendered irrelevant by this memorandum. They are, however, entitled to inquire into facts of which they have placed the plaintiff on actual notice. The defendants may, for example, inquire into the Center's complications rate because that issue was raised during the injunction hearing. The defendants, however, were obliged to notify the plaintiff of any changes to their interrogatory answers. interrogatories 46, 47, and 48 each relate to the defendants' basis for opposing the Center's operations and each of the defendants' answers suggest that their sole objection to the Center concerns their opposition to abortion. To the extent the defendants have not modified their interrogatories responses, they are bound by their answers at trial.

Third, the plaintiff seeks the court to bifurcate this action and hold separate trials on the issues of liability and

damages. The decision whether to bifurcate lies within the sound discretion of the trial court which must weigh (1) considerations of convenience, (2) prejudice to the parties, (3) expedition of the matter, and (4) economy of resources. Emerick v. United States Suzuki Motor Corp., 750 F.2d 19, 22 (3d Cir. 1984). The party moving for bifurcation bears the burden of showing that bifurcation is warranted in light of the general preference for a single trial. Lowe v. Philadelphia Newspapers, Inc. 594 R. Supp. 123, 125 (E.D. Pa. 1984). The court is not satisfied that any of the considerations listed above favor bifurcation in this case. Thus, this action will proceed as a single trial.

The defendants have also filed four motions in limine. First, the defendants seek the court to preclude the plaintiff from introducing photographs, videotapes, or similar evidence of the protest activities of other anti-abortion groups. Testimony during the preliminary injunction hearing on this matter revealed that no one individual or group of individuals played a leadership role in the protest activities at the Center. Various, distinctly separate and independent, persons protested the Center's activities. Some came to forcibly demonstrate against the Center, some to sing or chant, some to

march and carry posters, and some to conduct or attend religious services. In light of this lack of central organization and in view of the risks of unfairly prejudicing the defendants with the acts of other protesters, it appears unfair to this court to admit evidence of the activities of individuals unrelated to the particular defendants the plaintiff has identified. Therefore, for any evidence the plaintiff seeks to introduce, a nexus between the persons appearing in the evidence and the named defendants must be established.[14]

---

[1] In defending against this motion, the plaintiff argues that evidence relating to the activities of non-defendants may be admissible to the extent the named defendants attempted to exploit those actions to extort the plaintiff. The plaintiff offers the analogy of a rash of neighborhood fires intentionally set by X. A, an uninvolved third party completely unaware that X was the arsonist, threatens B that B's home will be the next arson casualty unless B pays A money to avoid the fire. Evidence of X's actions might be relevant in the extortion trial of A because A attempted to exploit X's conduct in order to induce B to pay A money.

These hypothetical circumstances are different from those at hand. The injunction hearing established that the plaintiff should have realized that a number of different, unrelated, and not centrally organized individuals joined the defendants in protesting the Center. Thus, the plaintiff could not have reasonably feared any of the defendants' attempts at extortion premised on the conduct of non-defendants.

The circumstances of this case militate against granting the defendants' request. The defendants' petition is vague and conclusory, offering the court no tangible justification for granting the stay, particularly in light of the fact that discovery began, proceeded, and concluded without objection from the defendants. The danger that proceeding will prejudice the defendants is de minimus. As of this date, the pending state criminal cases are nearing their resolutions. Moreover, the plaintiff correctly asserts that, were this court to make it a practice to stay civil proceedings against the defendants as long as the statute of limitations for criminal charges had not expired, the defendants could continuously delay this trial by demonstrating illegally on the plaintiff's property. The stay will be denied.

Finally, the defendants move to preclude evidence as to the plaintiff's sheriff fees and legal expenses. These motions will be granted as uncontested pursuant to Local Rule 20(c).

An order detailing these rulings follows.

ORDER

AND NOW, this 12th day of February, 1989, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. The plaintiff's motion to dismiss the two counterclaims asserted by the defendants is GRANTED.

2. The defendants' motion to stricke the plaintiff's motion to dismiss or, in the alternative, for summary judgment on the counterclaims is DENIED.

3. The defendants' motions for summary judgment on the plaintiff's RICO, antitrust, and contractual interference counts are each DENIED.

4. The plaintiff's objections to the magistrate's discovery order of November 7, 1986 are DISMISSED.

5. The defendants' objections to the magistrate's discovery order of November 7, 1986 are GRANTED IN PART. The defendants are entitled to discover the [9] city and state of domicile of each person encompassed in defendants' interrogatories numbers 7, 9, 17, 19, 21, 23, 25, 27, 30, 31, 58, and 65.

6. Both parties are GRANTED ten (10) days from the date of this order to comply with the magistrate's discovery order as amended in parts 4 and 5 above.

9

7. The plaintiff's motion to preclude the introduction of evidence concerning justification and motive is GRANTED. Defense counsel may, in the opening statement to the jury, explain the circumstances surrounding the defendants' presence in the plaintiff's property. Counsel may not extract testimony or introduce evidence of the defendants' beliefs on abortion absent a prior demonstration of the relevance of the proposed evidence. Counsel may not argue or imply to the jury, in either an opening statement or closing argument, that the defendants' beliefs afford them any type of legal justification defense.

8. The plaintiff's motion to preclude the use of inflamatory language when referring to abortion procedures is GRANTED.

9. The plaintiff's motion to preclude the defendants and their counsel from introducing evidence of any basis for their opposition to the Center other than their personal views on abortion is GRANTED IN PART. The defendants are entitled to inquire into facts of which they have placed the plaintiff on actual notice.

10. The plaintiff's motion to befurcate this action into separate liability and damages segments is DENIED.

11. The defendants' motion to preclude the introduction of evidence relating to the activities of non-defendants is GRANTED.

12. The defendants' motion for a stay of proceedings is DENIED.

13. The defendants' motion to preclude evidence as to the plaintiff's sheriff fees is GRANTED AS UNCONTESTED.

14. The defendants' motion to preclude evidence as to the plaintiff's legal expenses is GRANTED AS UNCONTESTED.

BY THE COURT:

/s/ James McGirr Kelly, J.

Title 18 U.S.C. § 1951. (The Hobb's Act) Provides in Pertinent Part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,00 or imprisoned not more than twenty years, or both.

(b) As used in this section. . . (2) [t]he term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or uder the color of official right.

Title 18 U.S.C. §§ 1961 et seq. (Racketeer Influenced and Corrupt Organizations Act) Provides in Pertinent Part:

§ 1961. **Definitions**

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by

imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion), . . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [entered Oct. 5, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§1962. **Prohibited activites**

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsectons (a), (b), or (c) of this section.

§ 1964. **Civil remedies**

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18USC § 1962] may sue therefor in an appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Federal Rule of Civil Procedure - Rule 51

INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection;. Opportunity shall be given to make the objection out of the hearing of the jury.

IN THE UNITED STATE DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC. :

CIVIL ACTION

v.

MICHAEL McMONAGLE, et al No. 85-4845

AMENDED COMPLAINT

1. In this civil action, plaintiff Northeast Women's Center, a Pennsylvania corporation which provides pregnancy testing, gynecological care, counseling and abortions to its clients, seeks injunctive relief and damages from a group of individuals who have entered into a conspiracy which has as its goal the destruction of the plaintiff's business and property. In furtherance of this conspiracy, defendants have harassed and terrorized plaintiff's clients and employees, unawfully entered upon plaintiff's propery and smashed its medical equpment, gained admission to plaintiff's premises through fraudulent representations for the purpose of

disrupting plaintiff's business, libeled and defamed plaintiff's employees and clients, and distributed false and misleading medical information to plaintiff's clients.

2. Jurisdiction is conferred upon this Court by virtue of 28 U.S.C. Section 1331, this being an action brought under the Constitution and laws of the United States. Jurisdiction is additionally conferred by 18 U.S.C. Section 1964, this being an action brought under the Racketeering Influenced and Corrupt Organizations Act ("RICO"). Jurisdiction is additionally conferred by 15 U.S.C. Sections 15 and 25, this being an action brought under the Clayton and Sherman Anti-Trust Acts. Jurisdiction over the state law claims is conferred by the doctrine of pendent jurisdiction.

3. Plaintiff Northeast Women's Center ("Center") is a Pennsylvania corporation located at 9600 Roosevelt Boulevard, Philadelphia, PA.

4. Plaintiff provides pregnancy testing, gynecological services, counseling and abortions for its clients.

5. Approximately thirty-five percent of the Center's clients receive abortions, ninety-five percent of whom are in the first trimester of pregnancy.

6. Plaintiff's clients include residents of Pennsylvania and of other states, including but not limited to New Jersey.

7. Plaintiff's facility and operations are licensed by the Commonwealth of Pennsylvania and are in compliance with all laws

[3]

and regulations of the City of Philadelphia and of the Commonwealth of Pennsylvania.

8. Michael McMonagle is an individual who resides at 4329 Freeland Avenue, Phiadelphia, PA.

9. Joseph Wall is an individual who resides at 407 Unruh Street, Philadelphia, PA.

10 Roland Markum is an individual who resides at 25 Ridley Avenue, Norwood, PA

11. Howard Walton is an individual who resides at 2706 Welsh Road, Philadelphia, PA.

12. Patricia Walton is an individual who resides at 2706 Welsh Road, Philadelphia, PA.

13. Henry Tenaglio is an individual who resides at 307 Glenridge Road, Havertown, PA.

14. Stephanie Morello is an individual who resides at 6635 Algard Street, Philadelphia, PA.

15. Annemarie Breen is an individual who resides at 2667 Cedar Street, Philadelphia, PA.

17. Ellen Jones is an individual who resides at 4611 Pennhust Street, Philadelphia, PA.

18. Kathy Long is an individual who resides at 6146 N. Fairhill Street, Philadelphia, PA.

19. Susan Silcox is an individual who resides at 8112 Martindale Road, Philadelphia, PA.

20. Paul Armes is an individual who resides at 136 West Allens Lane, Philadelphis, PA

[4]

21. Walter Geis is an individual who resides at 1112 Overhill Street, Wilmington, Del.

22. John J. O'Brien is an individual who resides at 1609 Raewyck Drive, West Chester, PA.

23. Dennis Sadler is an individual who resides at 414 Williams Street, Dwoningtown, PA.

24. Joan Andres is an individual who resides at 714 Swarthmore Drive, Newark, Del.

25. Miriam Dwyer is an individual who resies at 1128 Talleyron Road, West Chester, PA.

26. Mary Byrne is an individual who resides at 118 North Fairview Avenue, Upper Darby, PA.

27 John Murry is an individual who resides at 220 Robbins Avenue, Philadelphia, PA.

28. Linda Corbett is an individual who resides at 210 Ryers Avenue, Cheltenham, PA.

29. Thomas McIlheny is an individual who resides at 12448 Wyndrom Road, Philadelphia, PA.

30. Patricia Ludwig is a inividual who resides at 4050 "Q" Street, Philadelphia, PA

31. Gerrald Lynch is an individual who resides at 531 Allengrove Road, Philadelphia, PA.

32. Margaret Caponi is an individual who resides at 610 Darby Road, Havertown, PA.

33. Deborah Baker is an individual who resides at 179 Callhill Street, Phoenixville, PA.

[5]

34. Thomas Herilhy is an individual who resides at 100 apt. 17E Castle Plaza, Bronx, NY 10475.

35. Pasquale Varallo is an individual who resides at 7944 Ridgeway Street, Philadelphia, PA.

36. John Stanton is an individual who resides at 327 Summerdale Avenue, Jenkintown, PA.

37. Anne Knorr is an individual who resides at 3730 Gradyville Road, Newtown Square, PA.

38. John Connor is an individual who resides at 7064 Clover Lane, Upper Darby, PA.

39. Laurie Wirfell is an individual who resides at 303 Concord

Road, Exton, PA.

40. Helen Gaytos is an individual who resides at 137 Cyprus Drive, Broomall, PA.

41. Robert Moran is an individual who resides at 741 Hurst Road, Havertown, PA.

42. Earl Essex is an individual who resides at 204 Hamilton lane, Drexel Hill, PA.

43. Patricia McNamara is an individual who resides at 3429 Kelm Street, Philadelphia, PA.

44. Donna Andracavage is an individual who resides at 1480 Line Street, Philadelphia, PA.

45. Juan Guerra is an individual who resides at 406 Homestead Road, Straford, PA.

46. Linda Hearn is an individual who resides at 2532 E. Clearfield Street, Philadelphia, PA.

[6]

47. James Codichini is an individual who resides at 113 Taylor Lane, Kennet Square, PA.

48. Elliot Stevens is an individual who resides at 108 Front Street, Wilmington, Del.

49. Harry Hand is an individual who resides at 6510 Damascus Place, Laytonsville, MD.

50. The United States Constitution guarantees and protects a woman's right to choose abortion and to effectuate that decision.

51. Defendants have agreed among themselves and with others to organize, plan and take actions designed to disrupt, harrass and otherwise harm plaintiff's business and propety, with the intenton of destroying plaintiff's business and property, unless plaintiff ceases to provide abortion services to women.

52. Defendants have conspired among themselves and with others to destroy plaintiff's bsiness and property.

53. The defendants have, in associatin with each other and with others, formed an enterprise or a series of assciated

enterprises, including the "Pro-Life Non-Violent Action Project of Southeastern Pennsylvania," "The Pro-Life Coalition of Southeastern Pennsylvania," and "Save our Unborn Lives" through which they have attempted to achieve the ends described in paragraphs 51 and 52.

54. The defendants have conducted the affairs of the enterprise or enterprises identified in paragraph 53 through a pattern of racketeering activities.

55. The pattern of racketeering activities includes numerous violations of state and federal law within the last seven years,

[7]

including extortion, robbery, mail fraud and wire fraud, as is more particularly described below.

56. Several times each week for the past several years some or all of the defendants and others who are members of the enterprise or enterprises identified in paragraph 53 have stood in the entrances and parking areas of the Center's offices with signs depicting the Center and its employees as murderers akin to the Nazi concentration camp torturers.

57. Defendants have several times each week for a period of years accosted plaintiff's clients and told them that

they were "murdering their babies." Such verbal assaults are regularly made upon clients whether or not the client is seeking abortion services.

58. Defendants have regularly advised plaintiff's clients that abortions will have effects upon them such as shock, coma, loss of other organs, suicidal impulses and intense pain, despite the fact that no defendant is a physician and despite the fact that no reasonable medical opinion supports such a view. Indeed, the consensus of medical opinion is that abortions present significantly less risk to the patient than does childbirth.

59. Defendants have shouted and screamed at plaintiff's employees and clients, and have physically confronted and assaulted them. Defendants have made racial slurs at plaintiff's black clients, referring to them derogatorily as "Africans" and telling them they should "go back to Africa."

[8]

60. Defendants have offered plaintiff's employees money if they would cease their employment with the plaintiff.

61. Defendants have picketed the house of an employee of the plaintiff after she stated her address during her testimony in a trial arising out of the unlawful activities of the

defendants in an effort prevent her from testifying as a witness.

62. At the time of that picketing, defendants told neighbors, including children, that the employee was "murdering babies."

63. The activities described above were done intentonally and deliberately in order to place plaintiff's employees in fear of injury, and as a result, to prevent them from exercising their constitutionally proteted right to choose abortion, and to enter into contractual agreements with the plaintiff.

64. The activities described above were done intentionally and deliberately in order to place plaintiff's employes in fear of injury, in an effort to unlawfully induce them to leave plaintiff's employ and to interfere with their existing employment agreements.

65. Defendants have organized various organizations and corporations, such as those identifed in paragraph 53, in order to raise funds to support their unlawful activities directed at the plaintiff.

66. Defendants have solicited funds by means of interstate mail communications in order to obtain resources to support their unlawful activities directed at the plaintiff.

67. Defendants have fraudulently represented the nature, purpose, and activities of the organizations in those mail

[9]

communications in order to obtain funds from individuals and groups that peaceably oppose abortion.

68. Defendants routinely alter the names of their organizations, including those named in paragraph 53, in order to disguise their activities as well as to avoid law enforcement and judicial remedies.

69. Defendants have repeatedly entered onto plaintiff's property and into the plaintiff's offices for the express purpose of disrupting and interfering with plaintiff's business operations.

70. Defendants have stolen and destroyed thousands of dollars worth of plaintiff's medical equipment and in the process, committed assaults on plaintiff's employees and upon law enforcement personnel.

71. Defendants have intentionally and deliberately destroyed plaintiffs' property in an effort to prevent plaintiff form continuing its operations.

72. Defendants Donna Andracavage and Juan Guerra have entered onto plaintiff's property for the express purpose of interfering with plaintif's business after fradulently representing themselves as clients during the course of a telephone call.

73. When asked to leave, defendants Andracavage and Guerra, in the presence of plaintiff's clients and patients, began to scream "Jews Lie!" and other racial and ethnic slurs directed at the corporate officers of plaintiff.

74. All of the above activities were done intentionally and deliberately, in order to place the plaintiff in fear of economic

[10]

injury, and as a result, to unlawfully induce plaintiff to curtail its lawful and protected business activities and cease providing abortions.

75. On August 31, 1983 the Honorable Harry Takiff issued an injunction against defendants. A true and correct copy of such order is attached hereto.

76. Despite actual knowledge of the injunction, defendants have routinely violated that order on several occasions per week for several years, including but not limited to:

on August 10, 1985 defendats McMonagle, Wall, Morrello, Murkum, Walton, Tenaglio, Breen, Jones, Long, Silcox, Armes, Geis and O'Brien unlawfull entered upon plaintiff's property, seized various rooms on the property, assaulted staff and destroyed, stole and/or damaged several thousand dollars of medical equipement;

on October 19, 1985 all defendants again attemped, through force and threats of force, to seize plaintiff's business for the purpose of destroying or stealing plaintiff's equipment and to distrupt plaintiff's business activities, and assaulted several police in the process.

77. Plaintiff has been harmed in its business and property by the above described acts, in that:

a. it has been forced to hire security guards in order to protect its employees, clients and property;

b. it has lost days of business as a result of damaged medical equipment and blocked or impeded access to its facility;

c. its landlord, weary of the constant harassment and problems created by defendants, has refused to renew plaintiff's lease, and plaintiff has been unable to get any other landlord to lease space to it;

[11]

d. plaintiff has expended substantial funds to pay for past legal fees, court and sheriff's costs in attempting to enforce judicial orders necessitated by defendants unawful activities;

e. staff have been required to work overtime and extra hours in order to service the clients who were not able to be seen as a result of defendants' activities;

f. plaintiff has been forced to replace or repair thousands of dollars worth of medical equipment stolen and destroyed by defendants.

78. These increased costs and expenses are the direct and proximate result of defendants' above described actions.

79. Plaintiff has suffered and continues to suffer irreparable harm as a resulf of defendants' actions, to which there is no adequte remedy at law.

LEGAL CLAIMS-- COUNT ONE

VIOLATIONS OF RICO STATUTE

80. Defendants, by performing the above described actions, are engaged in an ongoing criminal enterprise and pattern of racketeering activity.

81. Such activity is in violation of 18 U.S.C. Section 1962.

82. As a direct and proximate result of defendants ongoing criminal enterprise and pattern of racketeering activity, plaintiff has been harmed in its business and property as described above.

83. Plaintiff is therefore entitled to treble damages pursuant to 18 U.S.C. Section 1964.

LEGAL CLAIMS--COUNT TWO

VIOLATION OF ANTI-TRUST LAW

[12]

84. In performing the above described actions, defendants have entered into a conspiracy to restrain trade and commerce, with the purpose and intention of destroying plaintiff's business.

85. Such activities are in violation of the Anti-Trust laws of the United States, including 15 U.S.C. Section 1.

86. As a direct and proximate result of defendants' conspiracy to restrain trade and destroy plaintiff's business,

plaintiff has been injured in its business and property as described above.

87. As a result, plaintiff is entitled to treble damages by virtue of 15 U.S.C. Section 15.

LEGAL CLAIMS--COUNT THREE

PENDENT STATE LAW CLAIMS

88. In performing the above described actions, defendants have committed the state law torts of intentional interference with contractual relations, assault, battery, trespass, intentional infliction of emotional distress, libel and slander.

89. As a direct and proximate result of such actions, plaintiff has been injured in its business and property, and suffered the damages enumerated above.

WHEREFORE, plaintiff prays that this Honorable Court:

1. Take jurisdiction over its claims;

2. Issue plaintiff declaratory relief holding that defendants' activities are violative of federal and state law;

plaintiff has been injured in its business and property as described above.

87. As a result, plaintiff is entitled to treble damages by virtue of 15 U.S.C. Section 15.

LEGAL CLAIMS--COUNT THREE

PENDENT STATE LAW CLAIMS

88. In performing the above described actions, defendants have committed the state law torts of intentional interference with contractual relations, assault, battery, trespass, intentional infliction of emotional distress, libel and slander.

89. As a direct and proximate result of such actions, plaintiff has been injured in its business and property, and suffered the damages enumerated above.

WHEREFORE, plaintiff prays that this Honorable Court:

1. Take jurisdiction over its claims;

2. Issue plaintiff declaratory relief holding that defendants' activities are violative of federal and state law;

3. Grant plaintiff injunctive relief prohibiting such activites and ordering dissolution of the conspiracy and enterprise;

4. Award plaintiff compensatory and punitive damages, including treble damages;

5. Award plaintiff its attorneys' fees and costs; and

6. Grant such other relief as the Court deems just and equitable.

RespectfullySubmitted
EDMOND A. TIRYAK
JULIE SHAPIRO
Counsel for Plaintiff
Maguigan, Shapiro, Engle & Tiryak
Suite 400
1200 Walnut Street
Philadelphia, PA 19107

(215) 563-8312

TRESPASS

These defendants are charged with a civil trespass, which is different from the crime of defiant trespass. A civil trespass is caused if the defendants entered land in the possession of the Northeast Women's Center.

If you find from the evidence that the Northeast Women's Center was legally entitled to possession of the land which is the subject of the lawsuit, and that the defendants entered thereon with no lawful right to do so, and if you also find the evidence to be insufficient to establish that the Northeasat Women's Center sustained any damage as a result of defendants' conduct, then you should award the plaintiff a nominal sum, such as one dollar, in damages. [Jury Inst.in Damages in Tort Actions, Douthwaite]

If you find that the Northeast Women's Center has suffered a damage as a result of the activities of the defendants, the Northeast Women's Center is entitled to recover the lesser of two figures, which are arrived at as follows:

(1) One figure is the reasonable expense of necessary repair of the property and the difference in the fair market

value of the property immediately before the occurrence and the fair market value after the property is repaired;

(2) The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

You may reward property damage for the lesser of these two figures only.

[Devitt & Blackmar §86.01]

Respectfully submitted,

Theresa Mallon Connolly, Esq

Defendants Exhibit S-5-Points For Charge On Extortion

EXTORTION

Under the law, a person is guilty of extortion if he obtains property from his victim, who must also be the owner of the prop-erty, through the use of fear and in so doing affects Interstate Commerce.

A person does not obtain property unless he has the intent to appropriate the property. Appropriate means to permanently or for an extended period of time exercise control over the property. Intent to appropriate means that the defendant must have a conscious aim or objective to appropriate the property to himself or to another.

Examples of "through the use of fear" would include threats to cause physical injury or threats to damage another's property.

No. 88-2137

In The

Supreme Court of the United States

October Term, 1988

MICHAEL MCMONAGLE, et al.,

Petitioners,

vs.

NORTHEAST WOMEN'S CENTER, INC.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondent Northeast Women's Center, Inc. provides a variety of women's health services, including abortions. Petitioners are twenty-six individuals opposed to abortion who, over a period of several years, personally engaged in a series of often violent actions inside and outside the respondent's offices. Petitioners' goal was to force the Center to stop providing abortion services. In the course of the actions, petitioners committed a variety of unlawful acts, including but not limited to extortion, assault and criminal trespass. At trial, respondent established that petitioners had violated the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1964(c), by, *inter alia*, engaging in a pattern of racketeering activity. The predicate acts shown were extortions of the respondent and its employees, as defined under the Hobbs Act, 18 U.S.C. Section 1951. Respondent was awarded $887 in damages under RICO and $42,087.95 in damages under a state-law trespass claim. Individuals opposed to abortion who participated in demonstrations but did not commit unlawful acts were not sued and were not held liable and are not parties to this petition.

1. Are defendants who are personally found to have committed acts of extortion and trespass immunized from damage liability by the First Amendment where the damages assessed were found to directly and proximately flow from their unlawful acts?

COUNTER STATEMENT OF QUESTIONS PRESENTED (Cont.)

2. Are enterprises which conduct their affairs through a pattern of extortion immune from liability under RICO absent proof of an underlying profit motive?

3. Does a plaintiff corporation have standing under RICO to assert as predicate acts the defendants' attempted extortion of plaintiff's employees' rights to continue their employment with plaintiff?

4. Where it is shown that defendants attempted to force plaintiff and its employees to abandon their entitlements to make business decisions freely and/or enter into contracts freely by means of fear or threats of force or violence, has the plaintiff established violations of 18 U.S.C. Section 1951 for purposes of a civil *RICO* claim?

5. Where respondent's assertion that petitioners failed to preserve an issue for review is unchallenged before the court of appeals does the court of appeals commit error if it accepts respondent's argument?

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STATEMENT OF THE FACTS

1. Respondent Northeast Women's Center, Inc. is a Pennsylvania corporation which provides pregnancy testing, routine gynecological services, abortions, counseling and community education in Northeast Philadelphia. (Preliminary Injunction Hearing, Day 2, pp. 29-30).[1] Thirty-five percent of the patients of the Northeast Women's Center receive abortions, and the clinic provides abortion services to patients up to the sixteenth week of pregnancy. Ninety-five percent of the patients who obtain abortions at the NEWC do so in the first trimester of pregnancy. (Preliminary Injunction Hearing, Day 2, pp. 29-30).

Petitioners are twenty-six individuals who believe that abortion is wrong. One of the defendants, Michael McMonagle, is the Executive Director of the Pro-Life Coalition of Southeastern Pennsylvania ("Coalition.")[2] Eight other defendants are active members of the Board of Directors for the Coalition. (N.T. 2-9).[3] Defendant McMonagle is paid $32,000 per year by the Coali-

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[1] The clinic advertises its services in the metropolitan Philadelphia area, and spends approximately $14,000 per year in radio, magazine and telephone book advertising in New Jersey. (N.T. 3-30). Five percent of its clients come from states other than Pennsylvania or from other countries. (Preliminary Injunction Hearing, Day 2, p. 30).

[2] The Coalition is not and was never a party to this case.

[3] The convention we will use here to refer to the record is as follows. We will refer to the Notes of Testimony as N.T. in this brief. We refer to the Petition as Pet., and the Appendix as Pet. App. Our appendix will be referred to as Res. App.

tion, which raises approximately $120,000 per year in revenue. (N.T. 9-43 - 9-44).

Four Coalition fundraising letters written and signed by defendant McMonagle were read to the jury. (p-44; N.T. 2-86 - 2-89). In them, McMonagle stated that:

> Our organization has been working very hard in 1985 to generate opposition to abortion chambers in Southeast Pennsylvania. Fortunately, this opposition has already resulted in one abortion chamber closing *** and made possible the closing of another one by the end of the year. ***
>
> In March, 1985 we received the welcome news that the Northeast Women's Center abortion chamber at 9600 Roosevelt Boulevard *** would not have its lease renewed. The administrator of this abortion chamber attributed this denial of lease renewal to the protest against the abortion chamber which our Northeast Pennsylvania Chapter has generated *** this abortion chamber lost its lease because of the prayers and protests of Pro Life citizens ***

McMonagle mailed these fundraising letters to some 2,500 persons in the metropolitan Philadelphia area, including some in surrounding states. (N.T. 9-25).

2. The defendants took a variety of actions designed to force plaintiff out of business, its employees to resign, and its patients to forego their constitutionally protected right to receive abortion information and services from plaintiff. These activities included: forcibly invading and seizing the clinic in order to prevent it from providing abortions to its patients; physically assaulting patients and staff; physically blocking patients and employees from entering the clinic; causing plaintiff to lose its lease

and to relocate; and targeting staff members for intimidation and harassment at the clinic and at their homes until they resigned from their employment at the NEWC.[4]

Invasions of the Clinic

At trial plaintiff established that on five occasions – three times after this lawsuit was begun – the defendants forcibly invaded its offices, seized its business, and physically prevented patients from receiving abortions.[5] The defendants admitted that these activities were planned in advance by persons active in the Pro-Life Coalition of Southeastern Pennsylvania. (N.T. 7-79). The evidence showed that these actions were not peaceful sit-ins, but violent and destructive acts of intimidation.

On December 8, 1984 some fifty persons stormed into plaintiff's offices. Thirty-one persons were arrested, including 12 defendants.[6] (N.T. 4-70). In order to enter the clinic, they knocked down and ran over the clinic's Administrator. (N.T. 8-57 - 8-58). When one of the staff resisted a defendant's forcible attempt to enter a room in

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[4] The defendants admitted using these exact same tactics in forcing another abortion clinic in Bridgeport, Pennsylvania to close. (N.T. 2-86 - 2-89; 9-29 - 9-31). Even after being enjoined by the Common Pleas court to cease their activities at that clinic, the defendants continued to engage in them, and were found in contempt of Court for their actions. (N.T. 9-30).

[5] McMonagle admitted that the invasions, which he referred to as "rescue missions," were conducted "for the purpose of preventing abortions from being performed while [the defendants] were inside." (N.T. 9-30).

[6] At the time of the trial, the criminal charges arising from the December 8, 1984 invasion had not come to trial in the Philadelphia judicial system. (N.T. 4-70 - 4-71).

which she was drawing blood from a 15 year-old patient, one defendant repeatedly slammed the door into the arms and leg of the staff member causing her to receive lacerations on her arms and leg, and collapse on the floor. The attack resulted in injuries to her neck and back to such a degree that she required medication, had to wear a neck brace, and missed ten days of work. (N.T. 8-59, 6-48 - 6-53). When confronted with the injuries, the defendant informed her that she needed to stop "murdering babies." The 15 year-old patient was reduced to tears by the incident. (N.T. 8-59). As the defendants were removed from the offices by the police, they shouted "Where is Glick?[7] We want Glick! You know, if you think its bad this time, its going to be worse." (N.T. 8-62). The jury was shown still photographs of the defendants inside the clinic, as well as photographs of the syringes which they had thrown on the floor after seizing the operating room. (N.T. 9-88 - 9-91).

On August 10, 1985 twelve persons – all defendants – invaded the clinic, were arrested and later convicted of defiant trespass. (N.T. 4-86). To gain entry, the defendants forced their way through a door, injuring two staff members in the process, one of whom lost time at work as a result of her injuries. (N.T. 8-115 - 8-117; Preliminary Injunction Hearing, Day 2, p. 39). They seized and locked themselves into the operating room, and staff saw one defendant, who was wearing a windbreaker even though it was a hot and muggy day, leave the room with objects hidden under his jacket. (N.T. 8-116 - 8-117). After the

[7] Richard Glick, M.D. was the medical director of the clinic at the time.

defendants were removed by the police, surgical equipment which had been operational earlier in the day had metal instruments jammed into their motors, and parts were missing. Anti-abortion stickers had been placed upon surgical equipment and elsewhere throughout the room. (N.T. 8-117 - 8-118; 9-93 - 9-95). The surgical machines were inoperable, and had to be replaced that day by the NEWC's home office before surgery could be performed.[8] (N.T. 9-95).

On October 19, 1985 forty persons, including 33 defendants, were arrested at the NEWC during an attempted invasion. Two defendants actually entered the clinic by knocking down the acting clinic administrator and rushing through the doors. The doors were locked before the rest could enter. (N.T. 9-110 - 9-112). After the police arrived and removed the two, the acting administrator ventured into the lobby and witnessed a number of defendants blocking the doors to the building and the clinic. One of the defendants grabbed her and attempted to pull her down, but she escaped back into the clinic. (N.T. 9-112 - 9-114).

It was then learned that two of the defendants had made an appointment for an abortion under assumed names and were in the waiting room. When asked to leave by the police, one turned to the patients and said: "Don't kill your baby. Don't listen to them. They lie to you. JEWS LIE! JEWS LIE!" (N.T. 4-59). The effect of this

[8] The machines were eventually repaired and equipment replaced at a cost of $887.00 to the clinic, which was the amount awarded to the plaintiff by the jury under the RICO count. (Exhibit 73).

activity on the patients caused them to weep, and one to collapse and require an intravenous blood transfusion. (N.T. 4-83 - 4-85).

On May 23, 1986 twenty-six persons, including 16 defendants, invaded the clinic. All were convicted of criminal conspiracy, disorderly conduct, and/or defiant trespass. (N.T. 4-74 - 4-76). The jury was shown a videotape of the invasion, and defendant McMonagle admitted that the defendants had been correctly identified in the presentation of the tape to the jury. (N.T. 9-37 - 9-38). One defendant was seen on videotape vowing to force the clinic out of business. (N.T. 5-34). During the invasion, the defendants were seen shouting and waving brochures in the faces of patients. They were heard telling the patients:

> They're going to cut you. They're going to take your money. They're going to rip your baby apart. *** They're going to kill you. They're going to hurt you. (Preliminary Injunction Hearing, Day 1, p. 35; Day 2, p. 5).

Finally, on August 6, 1986, 75-100 persons blocked the doors to the new offices of the NEWC, including 14 defendants. (N.T. 3-59 - 3-64; 3-67). The jury was shown a videotape of the incident. This attempted invasion was foiled only by the presence of sophisticated security equipment which had been purchased by the NEWC and installed in the new facility to which it had moved after losing its lease. (Memorandum and Order dated June 8, 1987, p. 11).

Activities Outside the Clinic

At trial respondent also relied on videotapes of the petitioners' activities. These videotapes were entered into evidence, P-76 and P-77, and were reviewed by the trial court, the jury and the court of appeals. (Pet. App. 8).[9] The tapes show patients surrounded by mobs in full blown riot conditions. They show defendants physically struggling with and pulling at patients who are physically caught in a tug of war while attempting to walk into the Center. They show the defendants wrapping patients up in "Pro-Life" banners to prevent their movement. Staff members are shown being knocked into walls and bloodied, being intimidated by mobs. Their cars are attacked when entering the clinic, and the doctor's car is halted while a mob surrounds it and screams vicious insults at him, calling him "Dr. Mengele" and the like.

Andrew Greenberg, Esquire, formerly a District Attorney assigned to deal with NEWC arrest cases and to develop policy with the police concerning the activities. there, testified about his experience at the clinic. (N.T. 7-60 - 7-61). He went to the NEWC in December of 1985 to observe the defendants' activities to better understand

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[9] Petitioners' suggestion that respondent acted improperly in "distilling" the videotapes introduced into evidence from the many hours of available tape, Pet. 5, is disingenuous at best. At the behest of the petitioners, the trial court had issued a pretrial ruling *requiring* plaintiff to edit the videotapes to ensure that the jury saw only scenes in which defendants, or persons having a proven nexus with defendants, appeared. (Pet. App. 134, 139). The court reviewed the tapes out of the presence of the jury to ensure compliance with the order. (E.g., N.T. 4-19, 4-40).

them for case preparation purposes, and arrived at 7:30 a.m. so as not to be seen by the defendants. (N.T. 7-61 - 7-62). He stood near closed windows in the third floor office and watched from behind drawn curtains. (N.T. 7-63). He saw a variety of the defendants and a crowd of some 40-50 persons. They gathered around defendant McMonagle when he took out a bullhorn, and he harangued them to continue their activities. (N.T. 7-63, 7-79 - 7-81).

The activities which McMonagle was encouraging and which were engaged in by a number of the defendants were described by Mr. Greenberg:

> As the patients would walk down this long sidewalk in front of the building, the protesters who were up against the barricades were yelling things at them in very loud voices. I was up on the third floor, the windows were closed, it was December and it was cold and I could hear very, very clearly what the people were saying: "They are going to kill your baby. Don't kill your baby. They are going to rip your insides out." This from all 40 to 50 people. (N.T. 7-81).

Ugly threats were also directed at staff:

> As I was standing upstairs at the window *** I happened to be standing next to Kate Strauser and I was standing there and you could hear individuals, but more than one yelling things when Kate would pull the curtain aside and put her face in the window. It would generate a reaction and you would hear "Kate Strauser, come down here, Kate Strauser. Come down here Jenny Kirby. Are you afraid to come down here Kate Strauser?" (N.T. 7-82).

The former District Attorney testified that he waited until he was absolutely certain that all of the demonstrators had left the site before leaving the clinic that day, because the frenzy of the crowd made him fear for his own physical safety. (N.T. 7-85).

One of the clinic's physicians also testified. He described how his car was surrounded every Saturday as he enters the clinic by crowds who hate him. As a result, he was no longer able to drive to the clinic alone and had to meet a security guard who drove him through the crowd in a truck. (N.T. 6-68 - 6-69). Even then, the truck was surrounded and the taunts continued:

> I am filled with feelings of fear. I know that my heart starts to race, that I have thoughts about my own well being. *** I start to tremble and I would say that my thought processes become a bit strained *** I feel shaky. (N.T. 6-69, 6-71).

The defendants' tactics towards plaintiff's employees succeeded in inducing several to quit their jobs.[10] Mary Banecker, the former Administrator of the clinic, quit her position with plaintiff due to the stress and harassment inflicted by the defendants. She had been knocked down and witnessed the violence and staff injuries inflicted during the defendants' December 8, 1984 invasion. She had seen an increasingly hostile group of defendants engage in increasingly threatening behavior:

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[10] One quit due to the stress and harassment and returned months later, only after the clinic had purchased sophisticated security equipment and hired security guards. (N.T. 6-52 - 6-53).

> I had seen Joseph Wall and Stephanie Morello be part of the group where they were screaming at a woman and child as they were entering the building where [the] Northeast Women's Center was housed and one of the people they started screaming at was this young child, "Don't go in there. They're killing babies. They're killing babies." And, this child started to scream and cry and he continued to yell at this child. (N.T. 8-75).

She resigned her position at the NEWC after the second invasion in August of 1985:

> I was really fearful of not understanding what these people's limits were in terms of trying to intimidate me and frighten me and I at several points was fearful of my life, that was the first time in my life that the possibility that someone would physically hurt me because of the work I did. It absolutely enraged me because I had children and I was really afraid that I would not be able to protect them from these people. (N.T. 8-66).

After she resigned, the harassment ceased. (N.T. 8-70).[11] Other executive staff members were similarly targeted and forced to resign. (N.T. 3-29, 4-16 - 4-18, 4-25).

We will not attempt here to catalog the numerous examples of the intimidating and threatening conduct of the defendants that were set forth in the 14 day long trial. We will summarize some here. These include: staff members testifying that they cannot leave the clinic without being screamed at; (N.T. 9-96) defendants jumping on staff cars as they arrive and pounding on their windows;

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[11] Other staff members testified that defendants had made pointed inquiries about the safety of the staff's children, and whether someone was watching them at that moment. (N.T. 9-96).

(N.T. 9-97) staff members being told that they will "fry in hell, rot in jail;" (Preliminary Injunction Hearing, Day 2, p. 36) defendants knocking over police barricades; (N.T. 4-40) defendants photographing patients; (N.T. 4-40, 3-79, 3-37) patients having to crawl under police barricades to enter the clinic for surgery; (N.T. 3-78) and defendants blocking the entrance to the clinic with banners. (N.T. 3-80).

With the exception of Michael McMonagle none of the current defendants took the stand to deny or rebut any of the charges against them.

3. On May 20, 1986 the jury returned with its verdict and answered a specific series of interrogatories prepared by the Court. The jury found, *inter alia*, that:

> 27 defendants were associated with or employed by an enterprise engaged in or affecting interstate commerce;
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> 22 defendants had personally committed at least two acts of extortion with respect to the clinic and its employees;
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> 5 defendants had conspired with those found to have committed extortion;
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> the Northeast Women's Center had suffered damages in the amount of $887.00 as a result of the racketeering enterprise;
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> 24 defendants had trespassed into the Center and the NEWC had suffered $42,974.95 in damages as a result;
>
> three defendants had intentionally and improperly interfered with the performance of a contract between the Center and its employees, but no damage resulted from such activities. Pet. App. 253-60.

4. On appellate review the Third Circuit affirmed the judgment.[12] On the issues relevant to this petition, the Third Circuit held: that the district court's instructions to the jury concerning the First Amendment were correct and proper and the jury had properly found that the actions of the defendants went beyond mere dissent (Pet. App. 13-14); that the defendants' political motives on abortion did not immunize them from statutes proscribing the very acts the jury found the defendants committed; (Pet. App. 12-13, 15-16); that the extortion of plaintiff's employees was directly related to defendants' goal of destroying plaintiff's business (Pet. App.16, n.8); and that the evidence showed that the defendants had in fact attempted to extort from plaintiff its property interest in continuing to provide abortion services. (Pet. App. 16).

REASONS FOR DENYING THE WRIT

The Petitioners' presentation of the facts both in their statement of facts and as they relate them in their argument, is delusive. Petitioners repeatedly suggest to this

[12] Petitioners' summary of the Third Circuit's ruling, Pet. 7, is inaccurate. Neither the Third Circuit nor the district court held that evidence of participation in one or more sit-ins was sufficient to permit a finding of Hobbs Act extortion. Additionally, neither the appellate court nor the trial court affirmed imposition of liability based on the jury's finding that a suction aspirator device had been dismantled, since the jury made no such finding. Rather, both courts reviewed all of respondent's evidence, considered the specific legal challenges raised by the petitioners, and concluded that the verdict in favor of respondent was proper.

Court that the only evidence against them was their conducting four peaceful sit-ins. (E.g. Pet. 13). Given the extensive and virtually unrebutted evidence of violence and intimidation presented below, and the court's finding on the matter,[13] such a position is untenable and deceptive.

Rather than accurately describing the evidence of their own violent conduct, petitioners discuss at length various peaceful and protected protest activities which have occurred outside respondent's office over the years. They refer to other individuals who have participated in those protected activities. Yet they decline to mention that those individuals who engaged in peaceful and protected protest activities are not and were never parties to this case. The petitioners here are those who exceeded the bounds of protected activity and engaged in violent and unlawful activities.

The Third Circuit specifically noted this distinction, which respondent has been careful to observe. "The Center has emphasized throughout the litigation that it is not challenging Defendants' free speech right to make public their opposition to abortion. Instead, this lawsuit was brought alleging illegal and tortious activity by Defendants that went beyond Defendants' constitutional rights of speech and protest." (Pet. App. 5-6).

Apart from this distortion, the petitioners include a number of factually incorrect statements. For example,

[13] "The Center pleaded and proved that defendants embarked on a willful campaign to use fear, harassment, intimidation and force against the Center ***." (Pet. App. 27-28.)

the district court never ruled that "the jury could not consider in its deliberations any evidence other than the four sit-ins in which petitioners had participated," (Pet. 3), nor does the citation offered by petitioners support this assertion.[14]

It is not practical for respondent to attempt to catalogue the distortions, omissions, and misstatements offered by respondents, although a selection of examples appear in the margin.[15] Suffice it to say that petitioners'

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[14] Petitioners assert that the district court concluded that apart from the invasions of the Center, "all of the other activities *** were protected by the First Amendment and could not form the basis for civil RICO liability." Pet. 6. This is untrue. The district court correctly concluded that while peaceful protest activities were indeed protected "[t]he First Amendment will not *** offer a sanctuary for violence *** The forcible, unauthorized entry into the Center's facilities is not protected conduct. Neither can the breaking of an automobile tail light or the inflicting of bodily injury scurry behind the First Amendment for refuge." (Pet. App. 93). Thus, evidence of other violent activities of petitioners was properly considered.

[15] Petitioners state that "[t]he jury found that there had been no robbery and that *petitioners had not extorted from the plaintiff's patients their right to obtain abortion or other services.*" (Pet. 6) (emphasis in original.) This is incorrect. The jury was instructed (without objection) that in order to establish a pattern of racketeering activity, plaintiff had to establish two acts of extortion or robbery. (N.T. 14-18 - 14-19). Consistent with this, the jury interrogatories directed that if the jury found a pattern of racketeering activity, it should identify, for each defendant, the two acts of racketeering activity committed. Interrogatories for the Jury, 4. Since the jury found that the petitioners engaged in extortion of the Center and extortion of its employees, it had no need to decide whether the petitioners

(Continued on following page)

inaccurate and incomplete presentation of the facts and discussion of the lower court opinions is in itself sufficient ground for denying the writ. Rules of the Supreme Court, Rule 21.5.

Apart from the problematic factual presentation of petitioners, the record in this matter is not generally adequate for review of the issues raised. This is so largely because of petitioners' failure to raise issues below or to raise them clearly and with appropriate legal support. For example, petitioners assert that a conflict exists between the result here and the holding of *NAACP v. Claiborne Hardware Co.*, 458 U.S 886 (1981). Yet petitioners never raised the applicability of *Claiborne* in the District Court. Nor did they propose any jury instructions concerning the issue.[16] Nor did they object to the First

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(Continued from previous page)

also engaged in robbery and extortion of patients. Certainly it never determined that petitioners did not do so.

The petitioners omit any mention of the trial court's extensive First Amendment instruction to the jury, or of the appellate court's review of that instruction, (Pet. App. 13-14), although the petitioners raise a First Amendment issue before this Court.

Petitioners state that "[h]ad the same conduct as was engaged in by petitioners been undertaken to create general mayhem *** the courts below would have such conduct remedied by a claim for violation of state laws *** rather than by imposition of civil RICO liability ***." (Pet. 11-12). There is simply no basis for this peculiar assertion, and petitioners cite no evidence that this is true.

[16] We have included all of defendants proposed points for charge in our appendix. None of their proposed points seeks a *Claiborne* instruction. Res. App. 1a-11a.

Amendment charge given by the District Court. Res. App. 12a-19a. Similarly, the defendants did not present the issues raised by their fourth or fifth questions to the appellate court.[17] This is hardly an appropriate record on which to grant review.

Finally, petitioners' hyperbole notwithstanding, this is not a remarkable case, nor does it establish new legal standards. This case is nothing more than an instance in which respondent successfully established the facts necessary to prevail on a RICO claim in a novel circumstance. It stands for nothing more than the proposition that where a group of people engage in a pattern of unlawful and violent extortionate conduct they may be held liable under RICO for that conduct.

In order to amplify the importance of this matter, petitioners repeatedly misstate the holding of the Third Circuit. The appellate court did not approve imposition of damages regardless of whether the damages were directly and proximately caused by the unlawful acts, as petitioners state. Pet. 8. The appellate court's interpretation of RICO and the Hobbs Act does not jeopardize the legacy of Dr. Martin Luther King and the right to engage in peaceful and lawful protest.

Petitioners rely heavily on citations to other pending cases in a variety of jurisdictions to demonstrate the

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[17] In the appellate court, petitioners argued that respondent could not recover for extortion of an intangible property right, a position the Third Circuit clearly rejected. (Pet. App. 16-17). They did not raise the fourth issue presented here. Petitioners presented no response whatsoever to respondent's waiver argument before the Third Circuit. (Pet. App. 9, n.4).

significance of this case. The mere existence of other litigation, assuming it arises from factually similar circumstances (an assumption not supported in the record here) does not elevate the questions presented here to some greater level of importance. Moreover, if as petitioners suggest, numerous similar cases are indeed pending, then the Court will have an opportunity to review the matters involved here on a record in which the issues were properly preserved and a petition which is better grounded in accuracy.[18]

Petitioners' specific points are without merit. There is no conflict between this decision and *Claiborne*. The defendants in this case were found liable only after the jury specifically found that they themselves had engaged in extortionate actions. They proposed no jury instructions below on this issue. The trial court charge on the First Amendment is not challenged here, nor was it objected to below. Both lower courts carefully scrutinized this case to insure that liability was properly imposed only for damages resulting from unlawful conduct, not from protected activities.

Petitioners' second and fourth arguments are closely intertwined. In essence, they assert that there can be no RICO liability absent proof of a profit motive and that petitioners must actually obtain something from respondent in order to commit extortion. The Third Circuit's

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[18] Petitioners cite to a number of newspaper articles and other sources which were not in the record below and the accuracy of which is open to question. (See, e.g., Pet. 8, n.9). Respondent objects to the inclusion of such factual materials in the brief or appendix.

holding on these points is unremarkable. It recognizes simply that seeking to gain control and power over a business by extortion, whether for profit motives or for other reasons, is an evil that can be addressed through RICO. It is entirely compatible with a substantial body of federal law.

Petitioners' third argument also raises a question on which the federal courts are in complete accord. It is hardly noteworthy that where the target of an extortion is an employee's right to continue his or her employment, the employer as well as the employee may complain of an injury under RICO and the Hobbs Act.

Petitioners' final point – that they are entitled to argue an issue that was waived below – is makeweight and cannot be seriously considered.

I. The District Court's Careful Instructions Concerning the First Amendment – Which Were Not Objected to – and its Special Interrogatories to the Jury Insured That Defendants Were Held Liable for Their Own Acts and the Damages Which Flowed from Those Acts.

The District Court was careful to instruct the jurors that the defendants could not be held liable for any protected First Amendment activity. It instructed them that:

> The First Amendment of the United States Constitution guarantees the defendants a right to express their views. The defendants have a constitutional right to attempt to persuade the Northeast Women's Center to stop performing abortions. They have a constitutional right to attempt to persuade the Center's employees to stop working there and they have

> a constitutional right to attempt to persuade the Center's patients not to have abortions there ***. The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to a protest.
>
> Speech does not lose its protective [sic] character simply because it may embarrass others or coerce them into actions. Peaceful speaking and picketing, leafletting and demonstration, cannot be a claim for extortion.
>
> *** However, the First Amendment does not offer a sanctuary for violators ***.
>
> Forceful, unauthorized entry on another's property is not constitutionally protected. N.T. 14-21 - 14-22.

The defendants did not object to the instruction. (Res. App. 12a-19a). The court then required that the jury answer detailed special interrogatories in reaching its verdict. The jury was required to specifically name individuals who it had concluded had committed at least two acts of extortion at the clinic, and to identify the extortions involved. The jury specifically named 22 petitioners who it found had each committed two acts of extortion. It specifically named 5 petitioners who it found had each conspired with those who had committed extortion. (Pet. App. 253-60).

The Court of Appeals reviewed this charge and relied upon it in reaching its conclusion that the verdict here complied with the requirements of the Constitution:

> We would have grave concerns were these or any other defendants held liable under civil RICO for engaging in the expression of dissenting political opinions in a manner protected under the First Amendment. The district court's careful instructions

to the jury with respect to the scope of the protections of the First Amendment precluded such a result here. (Pet. App. 13).

Petitioners' assertions that this result[19] conflicts in some way with *NAACP v. Claiborne Hardware Co.*, 458 U.S 886 (1981) misreads that decision. Nothing contained in *Claiborne* remotely suggests that defendants who engage in unlawful actions during demonstrations may not be punished for their own actions. To the contrary, Claiborne states that:

> the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained. 458 U.S. at 927.

The quotations from Claiborne that petitioners cite all involve the question of when the unlawful actions of some demonstrators may lead to the liability of an organization such as the NAACP. The Court was clear in its opinion that such organizational liability could not be imposed without strict proof of the organization's overall involvement in lawlessness. But no organization is a defendant here, and this case does not present the question of the defendants' liability for the actions of others. Petitioners here *themselves* engaged in unlawful conduct and were held liable for the damages proximately caused by that conduct.

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[19] Although the petitioners complain about the result in this matter, they do not state what was incorrect about the jury instructions, or the special interrogatories which led to that result. This is the case, we believe, because the petitioners did not object to the charge or the interrogatories on this basis.

Petitioners attempt to bolster their argument with an account of various activities that occurred outside respondent's office. (Pet. 12-13). Unaccountably, their account fails to mention the specific extortionate activities which formed the basis for liability. See, Counterstatement of the Facts, *supra*.

Petitioners were held liable based on repeated and often violent acts of trespass and extortion, not on the basis of conduct protected by the First Amendment or on the basis of association with others. The damages assessed were those attributable to the unlawful acts.[20] Respondent did not recover damages from individuals who did not participate in unlawful activity, nor did it recover damages beyond those that flowed from the unlawful activities.[21]

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[20] Petitioners make reference to the award of attorney's fees in this matter. Petitioners challenged this award in a separate appeal that is now pending before the Third Circuit. NEWC v. McMonagle, et al., No. 88-1644 (argued July 10, 1989). The propriety of the award of attorney's fees is not at issue here.

[21] The RICO damages arise from the destruction of medical equipment during one of the petitioners' forcible occupations of the NEWC's office at a time when the petitioners were in exclusive control of the room where the equipment was kept.

The trespass damages represent the cost of additional security precautions taken by the respondent following repeated trespasses by the petitioners and in light of their avowed intention to continue to commit forcible trespass. The uncontested evidence of record is that the increased security expenses were a direct consequence of petitioners' repeated unlawful acts.

In sum, this case presents no inconsistency with *Claiborne* or any other precedent of this Court. Further, petitioners' First Amendment rights were fully protected by the trial court's charge. Therefore, there is no significant issue presented here for review.[22]

II. The Decision of the Court Below Not to Impose Upon Plaintiff a Burden of Proving Defendants' Economic Motive is Entirely Consistent with the Prior Decisions of This Court.

Petitioners' second question raises an issue of the proper interpretation of the RICO statute.[23] Petitioners contend, in effect, that proof of a profit motive should be included as an element of a RICO cause of action.[24] As

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[22] Petitioners' references to other pending cases that may or may not be similar to this case, (Pet. 8-9, 14, n. 21), do not add weight to their argument. Petitioners' constitutional rights were carefully protected, and there is no viable claim to the contrary. Therefore, on the record here there is no constitutional question presented. Whether or not other cases may, if and when fully litigated, raise constitutional issues is not a question the Court could resolve by reviewing this case.

[23] The jury instructions that defendants' proposed below contained no requirement of profit motive, (Res. App. 1a-11a), and they did not object to the charge given to the jury on this ground. (Res. App. 12a-19a).

[24] Contrary to the statement in petitioners' submission, (Pet. 19, n. 22), respondent did introduce evidence of petitioners' successful efforts to profit from their unlawful activities. Petitioners raised over $120,000 a year and petitioner McMonagle received $32,000 per year on the basis of fundraising letters which bragged about their unlawful actions at the clinic. The Third Circuit noted this evidence but declined to pass on its sufficiency in view of its conclusion that proof of a profit motive was not necessary. (Pet. App. 15 n. 7).

the petitioners themselves note, this is an issue that rarely arises. It is therefore not a contention of particular significance. Further, petitioners' contention is not one supported by the words of the statute or by governing precedent.

This Court has had occasion to rule on the proper interpretation of RICO in the past. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4954 (June 26, 1989); *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 498 (1985). Indeed, it has specifically identified the elements required to establish a cause of action.

> A violation of Section 1962(c) *** requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.
>
> • • •
>
> [T]he statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in Section 1962(c), "an activity which RICO was designed to deter."

Sedima, supra, 473 U.S. at 496-97.

This Court has never suggested that plaintiffs in RICO cases have any burden to prove defendants' motives. On each occasion where it has done so, this Court has observed that the Congressional drafters elected to design a broad and far-reaching statute. The Court has consistently refused to limit the reach of RICO to some narrow class of offenses or activities, instead noting the breadth of its language in the scope of the offenses included.

The position proposed by defendants is contrary to the repeated declarations of the Court. This case would offer little more than yet another opportunity to remark yet again upon the breadth of the RICO statute.

The Court of Appeals' opinion is not an extension of RICO but rather is consistent with existing law.[25] In these cases defendant's motive is to gain power over the victim. That motive is shared by the petitioners here. Petitioners here sought, through a pattern of racketeering activity, to gain power over respondent in order to dictate respondent's business activities. It is no unwarranted extension of RICO to include within its breadth activities aimed at acquiring power over another.

While it is true that this case is at odds with *United States v. Ivic*, 700 F.2d 51 (2nd Cir. 1983), this is not sufficient reason to allocate this Court's time to the question proposed by petitioners. *Ivic* is over six years old and has not lead to development of a line of cases.[26] That decision predated this Court's decision in *Sedima*, and the

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[25] In *United States v. Green*, 350 U.S. 415 (1955), a union representative defendant used threats to obtain jobs for certain union members in violation of the Hobbs Act. There is no consideration of whether defendant was animated by a profit motive, by a desire to enhance his or the union's power, or by political beliefs. The Court noted that the Hobbs Act was aimed at particular conduct, and whether the individual obtained any benefit was of no concern. See also *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979).

[26] *Ivic* is the only case in conflict with this case. The remaining cases cited by the defendants essentially distinguish *Ivic* in that they uphold racketeering convictions, finding that sufficient motive was shown. It was therefore unnecessary for those courts to reconsider the holding of *Ivic*.

Second Circuit has not had occasion to reconsider the point since.[27] There is no active split in the circuits.

Finally, the position advanced by petitioners is without merit. Petitioners seek a ruling that would create an additional element to a RICO claim – proof of a profit motive. Under the petitioner's theory, a plaintiff that proved a pattern of extortion and arson could not recover under RICO if it could not sustain its burden of proving the defendants' motives. Nothing in the statute itself points to such a requirement.

As a matter of policy, it is difficult to see why animus should immunize conduct which, if done for profit, would be unlawful. For example, if a group of individuals committed a series of extortions to gain control of a business, determination of whether that conduct violated RICO might turn on whether the individuals were motivated by greed (which would place them outside petitioners' proposed exemption) or some other animus. If the individuals acted out of racial or political animus, for example, instead of greed, then they fall within petitioners' proposed exemption and could not be prosecuted under RICO.[28]

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[27] It is questionable whether the constricted reasoning of the Second Circuit in *Ivic* is valid in light of this Court's repeated expansive constructions of RICO.

[28] Under petitioners' theory, Iranian terrorists who firebomb bookstores that sell Salman Rushdie's novel would do so free of fear of RICO liability, since their motives are religious, and not for profit.

III. The Decision Below Permitting Extortion of Plaintiff's Employees to be Predicate Acts is Unremarkable and Consistent with the Prevailing Caselaw.

The defendants assert that this case creates a conflict between various circuits as to whether extortion directed at a plaintiff's employees can comprise part of a pattern of racketeering activity.[29] There is in fact no conflict between the circuits on this question and it was correctly resolved below.[30] The single appellate decision cited by defendants as being in conflict with the opinion below, *Yellow Bus Lines, Inc. v. Union Local 639*, 839 F.2d 782 (D.C. Cir. 1988), is entirely harmonious with the Third Circuit's opinion.

In *Yellow Bus* the court of appeals specifically permitted consideration of four instances of extortion in the form of direct threats of violence directed to plaintiff *or its employees*. The court did not consider additional acts of

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[29] The defendants have never questioned that, assuming extortion of the employees was properly included as a predicate act, plaintiff's proof of that act together with conspiracy to commit extortion of the plaintiff constitutes the requisite pattern. Indeed, the defendants' own proposed charge conceded that proof of two predicate acts was sufficient. (Res. App. 2a).

[30] Petitioners are disingenuous in stating that the extortion of plaintiff's employees should be discounted because the plaintiff did not suffer any "cognizable injury" as a result of its having several executive level employees forced from their jobs due to fear. (Pet. 23). There is no requirement under RICO that plaintiff prove separate damages for each predicate act alleged. Moreover, attempted extortions, which are clearly predicate acts under RICO, often involve situations where no financial loss results.

extortion aimed at persons or property not connected with plaintiff.

While the Third Circuit had no occasion in this case to consider the relevance of threats aimed at persons or property not connected with the plaintiff, it reached the same conclusion as the District of Columbia Circuit with regard to threats directed to employees – that is, that those extortionate acts, directed at individuals connected with plaintiff, could be used to establish the requisite pattern of conduct required under RICO.

The conclusion reached by the Third Circuit is sound. It is obvious that where extortion is directed to the employees of a business, with the aim of forcing the employees to quit their employment, the extortion harms not only the employee, but also the employing business.

IV. There is No Conflict or Reason of Importance to Review the Question of Whether Hobbs Act Violations Requires Proof that an Exortioner Actually Obtain the Object of the Extortion.

Petitioners' fourth issue raises a question of proper interpretation of the Hobbs Act, 18 U.S.C. Section 1951. The petitioners point to no inconsistency between circuit court decisions nor any other factor which raises this question to a level of substantial importance. Indeed, the Third Circuit's decision here is completely consistent with an established body of federal law. There is no reason to review it.[31]

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[31] At trial, defendants proposed an instruction modeled upon the standard Devitt & Blackmar jury instruction, which stated that in order to prove extortion, the defendants would

(Continued on following page)

The object of the extortion here was respondent's right to operate its business and to make business decisions freely. The right to make business decisions freely is an intangible property right. Many circuits in a variety of settings have recognized that extortion of an intangible property right may be a proper subject of a Hobbs Act violation. *See, e.g., United States v. Local 560*, 780 F.2d 267 (3d Cir. 1985); *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978); *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969).

Where an intangible property right is at stake, the extorter often cannot take possession of it him or herself, nor can he or she direct that it be given to a third party. By their very nature, intangible property rights are ofter not transferable. The purpose of the extortion is not to acquire the intangible right but rather to deprive the victim of it or to extinguish the right. Thus, in *Local 560*, the defendants did not obtain the members' rights to a democratically elected union leadership. Rather they forced the members to abandon them. In none of the above cited cases did the defendant obtain the property interest which was the object of the extortion.[32]

(Continued from previous page)

have to have been shown to "induced or caused [the respondent] to part with property." (Res. App. 3a). Their argument here is entirely at odds with the instruction they sought below.

[32] The ultimate object of the extortion in most of these instances is to gain power or control over the victim's business by forcing the victim to give up its right to control its own business. That is precisely the object of the extortion conducted

(Continued on following page)

Because the decision here represents no departure from established law, but merely an application of a substantial body of precedent, it does not warrant review by this Court.

V. There is Nothing Exceptional About the Court of Appeals' Refusal to Review the Merits of an Issue Below, Where Petitioners did not Respond to Respondent's Assertion of Waiver.

Petitioners' final issue is makeweight and presents at best a narrow and non-recurring factual question with regard to application of the Federal Rules of Civil Procedure.

In the appellate court, respondent asserted that petitioners had failed to preserve an issue[33] for review because they had not presented appropriate objections to the charge in the district court. The Court of Appeals noted that petitioners neither contested our assertion of waiver, nor did they point to any place in the record that the issues involved were in fact preserved. Based on respondent's argument, which was unopposed and properly supported with citations to the record, the Third Circuit found that petitioners had indeed waived certain issues. (Pet. App. 9, n.4).

Whether the Court of Appeals was obliged to scour the record to find support for petitioners' position in the

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here. Petitioners sought to gain sufficient power or control over respondent to substitute their own decisions for those of respondent. Clearly the petitioners meant to acquire and exploit power over the respondent.

[33] The issue itself involves the measure of trespass damages under state law.

absence of a response from them on the point is dubious at best. Asserting that the issue rises to one of exceptional national importance meriting Supreme Court review is utterly without foundation.

The question presented here is unlikely to have any impact on any case apart from this one. It presents an extremely unusual series of waivers and/or alleged waivers, unlikely to recur with any frequency. Certainly it is not in conflict with any other decisions of the courts of appeal.[34]

CONCLUSION

Respondent respectfully requests that the writ of certiorari be denied.

Respectfully Submitted,

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[34] While petitioners assert in the caption for this argument that there is a split in the circuits on this point, they do not offer citations to any conflicting opinion.

RESPONDENT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.	:	CIVIL ACTION
Plaintiff	:	
vs.	:	
MICHAEL McMONAGLE, et.al.	:	
Defendants	:	NO. 85-4845

DEFENDANTS' PROPOSED POINTS FOR CHARGE

Defendants, by their counsel, submit the attached proposed points for charge to the jury.

Respectfully submitted,

THERESA MALLON CONNOLLY, ESQ.

RACKETEER INFLUENCED CORRUPT ORGANIZATION

In order to prove a violation of the Racketeer Influenced Corrupt Organization Act, the Northeast Women's Center must prove the following four essential elements by a preponderence of the evidence:

(1) that the defendants engaged in a pattern of racketeering activity (defined by the commission of two [2] predicate acts alleged to be robbery and extortion). The commission of one predicate offense is legally insufficient to constitute a pattern;

(2) the existence of an enterprise affecting interstate commerce;

(3) a nexus or link between the pattern of racketeering activity and the enterprise; and

(4) an injury to its business or property by reason of the above.

[141, *Civil RICO 1986*, Practising Law Institute, p. 21].

EXTORTION

One of the acts of racketeering activity alleged committed by the defendants is that of extortion. Extortion means the obtaining of property from another with his consent, induced by the wrongful use of actual or threatened force, violence, or fear.

In order to establish the crime of extortion, the Northeast Women's Center must prove the following three elements by a preponderence of the evidence:

(1) that the defendants induced or caused the Northeast Women's Center to part with property;

(2) that the defendants did so by an "extortion" as I have defined; and,

(3) that in so doing, interstate commerce was delayed, interrupted, or adversely affected.

[§56.04 Fed. Jury Practice, Devitt & Blackmar]

ROBBERY

One of the acts of racketeering activity alleged committed by the defendants is that of robbery. In order to establish the crime of robbery, the Northeast Women's Center must prove the following five elements by a preponderence of the evidence:

(1) that the defendants forcibly took and carried away

(2) with the specific intent to steal

(3) the personal property of the Northeast Women's Center

(4) taken from the person of another by violence or putting in fear

(5) and with the intention to permanently keep the property so taken.

United States vs. *Medley*, 255 F.2d. 350 (2d Cir. 1958)

ANTITRUST CLAIM

Proof of injury to the Northeast Women's Center's business is insufficient to establish an antitrust violation

absent further proof that such an injury amounted to an unreasonable restraint of trade.

In order to find against these defendants on the antitrust claim, you must find that the defendants' conduct constituted an actual, unreasonable, and substantial restraint on trade or commerce. [II, Kintner, Federal Antitrust Law, §9.1, 5 (1980); Order of this Court, 2/17/87, page 7.]

The Northeast Women's Center must also show either an anticompetitive intent [and there is no evidence to indicate that any of the defendants are competitors of the Northeast Women's Center] or an antitrust effect [and the Northeast Women's Center has stipulated that it could prove no loss of business]. *Franklin Music vs. American Broadcasting Company*, 616 F.2d 528 (3d cir., 1979). Therefore, on the antitrust claim advanced by the Northeast Women's Center against these defendants, I direct that you enter a verdict on behalf of all defendants.

INTENTIONAL INTERFERENCE WITH CONTRACTS

The Northeast Women's Center has claimed that these defendants have intentionally interfered with their contractual relations with third parties. A person who causes a third person not to perform a contract is responsible for the loss suffered as a result of the breach or prevention of that contract. Because the Northeast Women's Center has claimed no loss or damage from the breach or prevention of any such contracts, I direct that you enter a verdict on behalf of all defendants.

TRESPASS

These defendants are charged with a civil trespass, which is different from the crime of defiant trespass. A civil trespass is caused if the defendants entered land in the possession of the Northeast Women's Center.

If you find from the evidence that the Northeast Women's Center was legally entitled to possession of the land which is the subject of the lawsuit, and that the defendants entered thereon with no lawful right to do so, and if you also find the evidence to be insufficient to establish that the Northeast Women's Center sustained any damage as a result of defendants' conduct, then you should award the plaintiff a nominal sum, such as one dollar, in damages. [Jury Inst. in Damages in Tort Actions, Douthwaite]

If you find that the Northeast Women's Center has suffered a damage as a result of the activities of the defendants, the Northeast Women's Center is entitled to recover the lesser of two figures, which are arrived at as follows:

(1) One figure is the reasonable expense of necessary repair of the property and the difference in the fair market value of the property immediately before the occurrence and the fair market value after the property is repaired;

(2) The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

You may award property damage for the lesser of these two figures only.

[Devitt & Blackmar §86.01]

Respectfully submitted,

THERESA MALLON CONNOLLY, ESQ.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.,	:	CIVIL ACTION
VS.	:	No. 85-4845
MICHAEL MCMONAGLE, et al.	:	
	:	

DEFENDANTS' PROPOSED POINTS FOR CHARGE

Defendants Linda Corbett, Thomas Mc Ilhenny, Patricia Mc Namara, and Pasquale Varallo, by their counsel, Thomas J. Short, Esquire, submit the following proposed points for charge:

1. Issue: *NO INFERENCE OF CONSPIRACY FROM A COMMON DEFENSE* REQUESTED INSTRUCTION: Counsel for the various Defendants have sat together here throughout the trial. At times, they have joined in objections and have shared the same defense exhibits. You have seen them join together in conference at times. Since their clients have been brought to Court and have been alleged to have committed similar conduct, counsel are entitled to sit together and to cooperate and even join in a common defense. My instruction to you is that this fact does not constitute evidence that any of the defendants were associated in any conspiracy. You are to draw no inference from any collaboration of counsel that any Defendant of one counsel was associated with a Defendant of another counsel based merely on the association of the attorneys.

SOURCE: *United States vs. Manufacturers' Association of the Relocatable Building Industry*, CR No. 70-945-SAW (N.D. Calif. 1971), aff'd. 462 F.2d 49 (9th Cir. 1972).

2. ISSUE: *DEFENDANTS NEED TO BE JUDGED SEPARATELY* REQUESTED INSTRUCTION: You should consider each instruction given to apply separately and individually to each Defendant. For example, Mr. Mc Ilhenny is entitled to be treated as a separate Defendant from anyone else, as is Mrs. Linda Corbett, and so on. Each Defendant is entitled to individual consideration of the evidence as applied to them to determine whether that particular Defendant participated in any combination or conspiracy.

Stated another way, Each Defendant has a right to that kind of consideration given on your part as if he or she were being sued alone.

SOURCE: (1st proposition) *Reno-West Coast Distribution Co. vs. Mead Corp.*, 613 F.2d 722 (9th Cir. 1979).

(2nd proposition) *Coughlin vs. Capital Cement Co.*, 571 F.2d 290 (5th Cir. 1978).

3. ISSUE: *MEMBERSHIP IN AN ASSOCIATION IS NOT, BY ITSELF, AN INFERENCE THAT A PERSON IS PART OF A CONSPIRACY.* REQUESTED INSTRUCTION: A person who is a member of an association such as the Pro-Life Coalition of Southeastern Pennsylvania, cannot be held to be a coconspirator merely by reason of the person's membership in the association. The person must be shown to have knowledge of any conspiracy purpose and participation is also required. Further, any proof of similar behavior between individuals, coupled with the

thought that one of the individuals might be a coconspirator, does not alone conclusively establish an agreement.

SOURCE: *Northern California Pharmaceutical Assoc. vs. United States* (CA 9 Cal.) 306 F.2d 379, cert. den. 371 U.S. 862 (19__)

4. ISSUE: *RESIDENTIAL PICKETING AND FIRST AMENDMENT* REQUESTED INSTRUCTION: It is a general premise in law that all streets, even those located in residential areas, are public forums. Further, there is no question that picketing, *per se*, is a valuable and protected form of communication. Residential picketing, quite clearly, brings the message the picketers wish to communicate right to the home. More importantly, the fact that the communicated message may reach and disturb families and children is clearly part of the point of the picketing. (SOURCE: *Schultz vs. Frisby*, 807 F.2d 1339 (7th Cir. 1986).) Communication or deliverance of a message through residential picketing may be uncomfortable to the recipients or targets of the picketing. The activity itself, however, is a protected activity by the First Amendment of our Constitution. Should you conclude that Defendants' actions of residential picketing induced or caused any interference with or nonperformance of a contract that Plaintiff had with a third party, you must find that Defendants are protected against liability for this tort by their First Amendment right of free speech. Further, if you conclude that any residential picketing was only a partial cause of a contract interference or nonperformance, you still may not attribute liability to the home picketers for the impact that picketing had on any contract. (SOURCE: *Feminist Women's Health Center,*

Inc. v. Mohammed, 586 F.2d 530 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979).)

In this case, before you can find that Defendants are liable for the tort of intentional interference with contract relations, you must first determine what actions of the Defendants supposedly induced or caused the nonperformance of the contract. If you then conclude that Defendants were taking these actions which may have caused interference out of (1) an exercise of an absolute right such as Free Speech, or (2) out of a need to protect a third party, or (3) because they were advocating issues in the public interest, then Defendants may not be found liable for the resulting interference.

It is also important that you be convinced any Defendant to whom you would attribute liability for contract interference *actually* had an intent to induce or cause a third party not to perform. (SOURCE: *Runyan v. United Brotherhood of Carpenters*, 566 F. Supp. 600 (D. Colo. 1983).

5. ISSUE: *PREDICATE ACTS - RICO - EXTORTION AND ROBBERY* REQUESTED INSTRUCTION: Before you can find each Defendant liable under the Racketeer Influenced Corrupt Organization allegation, you must find that each and every Defendant committed any combination of two offenses involving Robbery and Extortion. In other words, you must find either two robberies, two extortions, or a robbery and an extortion. In this regard, it was the plaintiff's burden to convince you that two of these offenses were committed by each and every Defendant. You must assess the conduct of each defendant as you recollect it and determine if you can attribute two of

these offenses to each and every Defendant. In performing this chore, you cannot attribute a robbery or an extortion act to any Defendant unless you are convinced that each and every element of those crimes has been proven to you by the Plaintiff. This was the Plaintiff's burden to accomplish. It was not the Defendants' burden to disprove it.

In this regard, you may not find that a robbery was committed unless you can find that property was actually taken from the Plaintiff with an intent to deprive the Plaintiff of that property and this taking of property was somehow facilitated by violence or intimidation that resulted in the taking of the property. You may not find that any extortion was committed unless you conclude that Defendants unlawfully obtained something of value from Plaintiff by means of threat or coercion. Extortion may only proceed from a corrupt mind. That means that there is a special mental element which constitutes a state of mind requirement for the crime to be committed. That mental element is corruption. Should you find that Defendants' conduct constituted persuasion, albeit persistent persuasion, to bring about a change of social conduct, and not conduct designed to exact a penalty from Plaintiff for not complying with a threat, then you may not find that extortion has been proven. SOURCE: Common Law.

Respectfully submitted,

/s/ Thomas J. Short 5/2/87
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(p. 14-46) Charge of the Court

opportunity on how they think I should respond. So it may take a little while, but perhaps, if you are stuck, and I am not saying you should be, but if you are stuck on RICO and you are waiting for an answer, you may want to go to trespass or you may want to go to something else and then go back to RICO. The whole process does not have to stop while you are waiting for to debate the issues out here.

May I see counsel at sidebar?

(Sidebar)

THE COURT: Why don't we do this, this will take a little while. I will excuse the jury.

(Open Court)

THE COURT: Members of the jury, this is an opportunity for counsel to tell me what they think about the charge and that will take a few minutes and I suggest you may want to leave and go back and just relax for a couple of minutes.

(Whereupon, the following transpired at sidebar, and the jury left the courtroom:)

THE COURT: Mr. Tiryak?

MR. TIRYAK: A couple of things. You talked about people, if they found somebody had been convicted of trespass criminally. I think you said you may consider that?

THE COURT: That's right.

MR. TIRYAK: We request they must find if they were convicted –

THE COURT: I know you did and I will overrule your objection.

MR. TIRYAK: Secondly, did they find that there was an enterprise, whose activities affected interstate commerce. I think the instruction and the interrogatory whether they affected or attempted to affect, because in the Jannotti case, for example, there it was never any possibility of the enterprise affecting interstate commerce.

THE COURT: You are probably technically correct, but I really don't think that's going to make that much difference, but I'll say wherever they affected or attempted the affect.

MR. TIRYAK: All Right.

THE COURT: I don't think that's serious.

MR. TIRYAK: This, I think, can be important. I am concerned the jury might assume, that is, if somebody invaded on August 10th, it would be our position that that person could have committed four predicate acts that day and I would like a further clarification that anyone of four predicate acts could be in one invasion. You don't have to show there were two invasions to show two predicate acts, but a combination of an extortion and a robbery or two extortions in the same invasion could be included.

When you talked about the damages on trespass, sir, you talked about being liable for physical harm. I may have missed it, but we obviously – one of our claims is the cost of hiring (p. 14-48) people to protect the property,

security guards and we would request you make it clear to the jury that's an element.

THE COURT: I think I did tell them.

MR. TIRYAK: You did say that later.

THE COURT: The dollar claim principally was the security cost. I will consider that. I am just wondering –

MR. TIRYAK: I am virtually certain under the law, they can't give a general awarding of punitive damages. They have to do it by defendant.

THE COURT: Oh, yes.

MR. TIRYAK: They have to list the people and the amounts. They just cannot order $100.00.

THE COURT: We ought to take those forms back and get that straightened out.

MR. TIRYAK: In order to make this brief, rather than repeating a bunch of things that I know you will not agree with can I just incorporate the argument on the directed verdict and to the extent that's inconsistent with your instructions, then exceptions will be granted?

THE COURT: Yes.

THE COURT: Who is next?

MR. SHORT: Judge, you gave on page 7 of the interrogatories I think it should be consistent with the language on page 4. On page 4, after you say, "Next to each name list the two acts of racketeering activity you find the (p. 14-49) defendant engaged in" and you call for a special finding of the two acts and on page 7, it's

possible something was omitted. Perhaps there brought in on the second theory –

THE COURT: As a co-conspirator they are liable.

MR. TIRYAK: They don't have to do any acts.

THE COURT: I will deny that.

MR. SHORT: On the – that was a clarification.

THE COURT: All right.

MR. SHORT: The other point is, on the difference, the trespass, you charge there is no material difference between defiant trespass and trespass.

THE COURT: Do you think there is?

MR. SHORT: In the Pennsylvania statute.

THE COURT: What is it?

MR. SHORT: It clearly distinguishes a person –

THE COURT: I think defiant trespass implies a higher –

MR. SHORT: It's a lesser degree. It's a grade lower.

THE COURT: What is the difference in the defiant trespass?

MR. SHORT: Defiant trespass is disobediance of an order to move, to get away.

THE COURT: If a policeman came into my house and ordered me to leave –

MR. SHORT: It's different.

(p. 14-50) THE COURT: No. It's disobediance of an order. The order has to be based on the law. What is the lawful right of an officer to charge somebody with defiant trespass?

MR. SHORT: If I had the Pennsylvania statute –

THE COURT: Somebody on the land of another, intentionally on the land.

MR. SHORT: When you have a fire –

THE COURT: I don't know whether it's defiant trespass. It may be some police action.

MR. SHORT: As a practical matter, it only affects Linda Corbett.

THE COURT: All right. What else do you have?

MR. VOLZ: Your Honor, in the instructions on robbery, there is nothing mentioned as to intent and I believe under the law, at least under the New York law, defendants have to have the intent to permanently retain property taken and under Pennsylvania law, the defendants have to have the specific intent to deprive the owner of that property. It is a specific intent crime and the instruction was more or less taking with force, however slight, and that intent to steal is missing.

MR. TIRYAK: I thought the Judge said, "intentionally enter the premises of another with the intent – "

THE COURT: I will tell them that.

MR. STANTON: Your Honor, again, just for the record, the punitive damages thing –

(p. 14-51) THE COURT: I understand.

MR. STANTON: One of the reasons where it points out it's unfair as I indicated in the motion, you have said during the instructions, the motive, no matter how well –

THE COURT: Outrageous conduct. In other words, I can believe – I don't know why I use an example, but I can believe what I am doing is well motivated. I think when you cut the hands off everybody who gambles, that's one way to curb gambling. Motive is a personal thing.

MR. STANTON: I understand that.

THE COURT: I hate to tell you, what I was reading from, was pretty standard. It's at least bold print.

MR. STANTON: Yes, it's the Restatement of Torts. His complaint had no mention of punitive damages.

THE COURT: His complaint said damages. The idea of a pre-trial memorandum sought of puts you on notice, but he said in his argument, he wanted punitive damages. I think the whole case of the plaintiff was that it was outrageous conduct.

MR. TIRYAK: You can't really argue extortion without claiming it was outrageous conduct.

MR. STANTON: I thought we would come down here today at 1:00 o'clock and go over the point for changes.

THE COURT: We wont offer them.

MR. STANTON: At 5:00, we went over it. Ms. Connolly wanted to bring out wealth is an issue of punitive damages.

(p. 14-52) MR. VOLZ: I will join with Mr. Stanton on that because we had several conferences and punitive was not mentioned until the has closing argument of counsel.

MR. SHORT: Maybe you can slip the jury a clarifying instruction, you can give them another page and you can send it out to them.

THE COURT: All right.

MR. STANTON: We do want the corrections suggested by Mr. Tiryak, but we're not waiving the objection to them getting punitive damages for the reasons stated.

MS. CONNOLLY: I join in all defendants' exceptions.

THE COURT: I think I will tell them to come in at 9:30 tomorrow morning and start the deliberations, rather then have them start now. I will send them home and change the page as to the punitive damages, that they have to name each person that they find punitive damages against.

MS. CONNOLLY: Is there any way you would reconsider letting them go out now?

MR. TIRYAK: I couldn't answer those questions now.

MS. CONNOLLY: I already answered them. I answered them quickly.

THE COURT: I know you could answer them.

(Whereupon, the following transpired in open court with all counsel and parties being present:)

THE COURT: Would you ask the jury to come back in, (p. 14-53) please?

(Whereupon, the jury entered the courtroom and the following transpired in open court in the presence and hearing of the jury:)

* * *

No. 88-2137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL MCMONAGLE, et al
Petitioners

v.

NORTHEAST WOMEN'S CENTER, Inc.
Respondent

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION AND APPENDIX

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TABLE OF AUTHORITIES

I. INTRODUCTION

Respondent's brief in opposition only serves to underscore the need for review of this case.

A. The split among the circuits created by this case is beyond dispute

Respondent concedes that the decision below "is at odds with *United States v. Ivic.*, 700 F.2d 51 (2d Cir. 1983)." (Resp. Br. 24). Indeed there is no question that the Third Circuit's unprecedented and dangerous ruling conflicts sharply with Second and Eighth Circuit decisions holding that RICO does not apply where neither the alleged enterprise, nor the pattern of racketeering activity contain any economic or profit-making elements.[1] The decision is also utterly irreconcilable with Congress' plainly stated intent that RICO apply *solely* to crimes adapted to *commercial exploitation* (Petition 18-23).

Despite the fact that the Second and Eighth Circuit RICO decisions and petitioners' briefs below contain an exhaustive analysis of the legislative history of RICO[2] which leads inexorably to the conclusion that RICO does not apply to petitioners' conduct, both the Third Circuit opinion and respondent's brief studiously avoided any discussion or analysis of RICO's legislative history and with good reason – Respondent's RICO claim simply will not withstand analysis of the statute and its legislative history.

B. This case presents an appropriate record for consideration and resolution of the issues raised by the petition

Nothing in respondent's Brief or in the record supports respondent's assertion that this case fails to present an appropriate record for consideration of the issues raised in the Petition. (Resp. Br. 16).

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1. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) *cert. denied*, 109 S. Ct. 511 (1988); *United States v. Ferguson*, 758 F. 2d 843 (2d Cir. 1985) *cert. denied* 474 U.S. 102 (1985); *United States v. Bagaric*, 706 F. 2d 42 (2d Cir. 1983) *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

2. Petition 10-11, 18-23.

With respect to the fourth issue presented in the petition it should be noted initially that petitioners did not base their arguments concerning the proper definition of extortion exclusively upon error in jury instructions. Petitioners also contended that since the evidence showed that they neither appropriated to themselves nor any related third party any tangible or intangible property, it was apparent upon completion of plaintiff's case that a directed verdict should have been entered for petitioners on plaintiff's claim of Hobbs Act extortion. (Petition 25). Petitioners' motion was denied. (Petition 6, Pet. App. 94-96 and 261-67). *See also*, argument on motions for directed verdict. (Reply App. 1-4)

Respondent's statements that it included all of petitioners' proposed points for charge in its appendix (Resp. Br. 15, n.16) and its contention that the petitioners' proposed points for charge were at odds with the issue raised in Section IV of the petition are both absolutely erroneous. Respondent's statements are astonishing given the numerous motions filed with respect to this very issue and counsels' vigorous arguments with respect thereto (Petition 25-28, Pet. App. 88, 261-67 and Reply App. 1-13). Respondent chose to omit from its appendix all of petitioners' supplemental points for charge on extortion, which petitioners have included in the appendix hereto.

During the course of its deliberations the jury requested that the definition of extortion be clarified. The trial court's proposed response to the jury's request prompted objections by all of petitioners' counsel including the following:

> the property can't just be surrendered to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third party and that is the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary.

(Petition 26, n.29 *quoting* N.T. 16-2). Petitioners' counsel then proffered the standard New York jury instruction set forth in Pet. App. 163 and in Reply App. 6. At the same time counsel for petitioners also filed with the court a Memorandum to the Trial Judge Sur Jury Deliberation Question (Doc. No. 183) and a Motion to Correct Defect in Jury Instructions (Doc. No. 183) addressing the definition of extortion (Reply App. 7-13). The precise issue raised before this court in Section IV of the Petition could not have been more clearly framed or addressed below.

Respondent's contention with respect to the appropriateness of the record for consideration of First Amendment issues is also without merit. Petitioners raised the First Amendment as a defense numerous times in both their pleadings, and in argument before the lower court.[3] The district court addressed at length both the general application of the First Amendment to this case (Pet. App. 91-96) and this Court's *Claiborne* decision (Pet. App. 93), and the Third Circuit also addressed (albeit incorrectly) the application of the First Amendment to this case. (Pet. App. 12-16). The application of *Claiborne* to this case was also the subject of a Petition for Rehearing In Banc in 88-1333, which was rejected by the Third Circuit. (Pet. App. 33). Contending that the courts below were blissfully unaware of the important First Amendment issues raised by the extension of RICO's "drastic remedies"[4] to the political arena is disingenuous at best. The issue has been preserved and is properly before this court.[5]

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3. *See e.g.* Defendants Answer to the Complaint, Defendants' Pretrial Memorandum, and argument during the preliminary injunction hearing, and numerous times during the course of the trial with respect to the admission of evidence of conduct of non-defendants as the basis for the Hobbs Act extortion.

4. *H. J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (June 26, 1989).

5. Even if respondent's position had some basis in fact, it has long been the position of this Court that it will consider questions passed upon by the courts below, although not, or not properly raised by the parties, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Sabbath v. United States*, 391 U.S. 585 (1968); *Jones v. United States*, 362 U.S. 257 (1960); *Mallett v. North Carolina*, 181 U.S. 589 (1901).

Further, as is more fully discussed below, respondent's summary of the evidence and testimony contains numerous deficiencies: respondent repeatedly *attributes to the petitioners alleged conduct the perpetrators of which are unknown or unidentified by respondent or its witnesses,*[6] portrays as factual findings that which is merely the testimony of interested witnesses and omits conflicting evidence and testimony presented by petitioners below which dramatically alters the inferences respondent hoped to create. While petitioners have detailed a number of these deficiencies in Section II *infra,* ultimately respondent's attempts to obfuscate the important constitutional and statutory questions by presentation of erroneous factual assertions presented herein are largely irrelevant for two reasons.

First, even if the facts were exactly as respondent states them, respondent *still* would not have proven a Hobbs Act extortion or a RICO violation. *Second,* petitioners and respondent are in agreement with respect to those facts relevant to consideration of the issues raised in the petition for certiorari and necessary for this Court's resolution of those issues.[7]

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6. Respondent's attribution to defendants of actions taken by non-defendants is not a novel tactic. As was discussed in petitioners' original submission, substantial portions of the evidence presented in this case consisted of activities engaged in by non-defendants which were admitted into evidence over petitioners' objections on the ground that the non-defendants were members of the same political organization as certain of petitioners. (Petition 5 and, e.g. Pet. App. 167-72).

7. As evidenced by testimony set forth at length in the appendix accompanying the petition, respondent's witnesses testified and respondent does not dispute that its suit followed hundreds of protests during the nine year period from 1976 through the time this action was commenced. Respondent and petitioners agree that there were indeed incidents during some of the demonstrations at the respondent's place of business which went beyond conduct protected by the First Amendment. Petitioners detailed a number of these incidents (*see e.g.* Petition 3, nn.2, 3) and framed each of the issues they are requesting this Court review on the *assumption* that there was illegal conduct.

C. This case undeniably involves issues of broad national importance

The broad national significance of the lower court's rulings is highlighted by the flood of RICO actions against political protesters spawned by the Third Circuit's decision.[8] These actions, brought against political protesters by municipalities seeking to recover the costs of arresting protesters and picketers, by rival political organizations holding views diametrically opposed to those of the protesters and by abortion clinics, each rely exclusively upon the Third Circuit's decision in this case to fashion relief which can only be characterized as trampling First Amendment freedoms and wreaking havoc with both RICO and the Hobbs Act. That the course taken by the Third Circuit must be corrected is undeniable.

II. Respondent's Counterstatement of Facts

It is impractical to attempt a complete cataloguing of each of the inaccuracies concerning the record set forth in respondent's brief, however the following examples are instructive in

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8. *See e.g.,* the following actions which have been filed since the filing of the petition, and which are in addition to those cited in note 10 of the petition, *Town of West Hartford v. Operation Rescue et. al.,* No. 89-400-PCD (D. Conn., filed June 29, 1989) (RICO action by municipality against various individuals, political organizations, and the editor of a local newspaper (alleging that he had supported the illegal protests by editorializing in favor of them) and alleging extortion based on organization of or participation in sit-ins and seeking to recover the personnel costs incurred by the municipality in arresting protesters); *West Carolina Medical Clinic, Inc. v. Operation Rescue,* et al., No. AC-89-140 (W.D.N.C., First Amended Complaint filed August 18, 1989) (RICO action against 40 individual protesters alleging Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business based upon protests and sit-ins); *Volunteer Medical Clinics, Inc. v. Operation Rescue et al.* No. 89-3-89-156 (E.D. Tenn., Amended Complaint filed June 1, 1989) (RICO action against 105 individual protesters alleging Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business based upon protests and sit-ins); *Birmingham Women's Medical Center, Inc. v. Operation Rescue and Liberty Church et. al.,* No. C.V. 89-P-1261-S (N.D. Ala., filed July 29, 1989) (RICO action against church and 60 individual protesters alleging Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business based upon participation in and advocacy of protests and sit-ins).

assessing the strength of respondent's case.

Respondent stated as fact, although no factual finding to such effect had been made, that on December 8, 1984, 12 of the Petitioners "in order to enter the clinic, . . . knocked down and ran over the clinic's administrator." (Resp. Br. 3). Examination of the notes of testimony referenced by respondent indicates that the administrator testified that she was knocked down but *failed to identify who was responsible for the alleged incident, or whether indeed it was any one of the petitioners or some other third party.* This is of course dramatically different than the inference which respondent wanted to create, i.e., that the only way for petitioners to have gained entry on December 8, 1984 was to knock over the administrator.[9]

Concerning the October 19, 1985 demonstration, respondent states that a defendant "grabbed" the clinic administrator and "attempted to pull her down, but she (the administrator) escaped back into the clinic." Respondent's citation to the record again indicates that Respondent's portrayal of testimony was inaccurate. Specifically, the administrator testified that "someone began "pulling" on her . . . "trying to pull me down". She then testified that "I resisted and pulled back."

9. Respondent focuses on the alleged actions of a single defendant who, according to testimony presented by respondent, opened a door in such a way that a staff member was struck with the door. The idea of course is to portray all of the defendants as being violent and dangerous, an assertion which is not supported by the record. Concerning the August 10, 1985 sit-in, respondent states, again as if a factual finding to such effect had been made, that the 12 petitioners involved with that incident injured two staff members. This statement was based upon nothing more than the testimony of a third staff member who testified at trial. Respondent did not call as witnesses those staff members allegedly injured at the time of the trial. If it can be proven that any protester did injure a staff member or any other person, such protester would be liable for assault or battery. However, such allegations cannot serve as evidence that petitioners committed Hobbs Act extortion as to the respondent. Respondent also states that two defendants, also on October 19, 1985, told patients in the plaintiff clinic that "Jews lie!, Jews lie!" Incredibly, respondent neglects to state that the same defendants whom respondent has once again maligned and slurred "categorically denied ever having made such patently offensive statements." Defendants Memorandum of Law In Support of Pre-Trial Motion In Limine 1-2.

This witness never stated that she "escaped back into the clinic". More importantly, *the administrator never identified who it was that allegedly attempted to pull her down outside the clinic* – was it one of the defendants or was it some third party demonstrating at the clinic on that day?

III. The "Precision of Regulation" Demanded By Claiborne Hardware Is Lacking In This Case

Much of the evidence upon which both respondent and the Third Circuit rely so heavily for the assertion that petitioners engaged in Hobbs Act extortion does not distinguish between conduct which is protected by the First Amendment, and that which was illegal and outside the protection of the First Amendment. As an example, both the Third Circuit (Pet. App. 17) and respondent (Resp. Br. 2) relied upon language contained in fund-raising letters written by petitioner McMonagle in support of a finding that petitioners committed Hobbs Act extortion. Noting that respondent's administrator had attributed the non-renewal of respondent's office lease to protests at the clinic, McMonagle stated that the lease was not renewed "because of the prayers and protests of Pro Life citizens." (Resp. Br. 2). What activity would respondent have the Court believe resulted in non-renewal of the lease and evidence of Hobbs Act extortion? Prayers or "protests"? If the latter, was the non-renewal of the lease attributable to the hundreds of entirely legal, First Amendment protected protests which occurred every Wednesday, Friday and Saturday for a period of several years outside the respondent clinic, or solely to the sporadic illegal conduct?

Surely the answer cannot be discerned from the fundraising letter, or from the testimony of respondent's witnesses. No testimony of the landlord or its representatives was presented at trial as to whether the landlord refused renewal of the lease as a result of the protests or for some entirely unrelated reason. Respondent's reliance upon such "evidence" for a finding of Hobbs Act extortion and RICO liability is but one example of its failure to comprehend the "precision of regulation" required by this Court's decision in *Claiborne Hardware.* (Petition 13-17).

IV. Respondent's Remaining Arguments Do Not Dispel the Direct Conflict With the Second and Eighth Circuits

Contrary to respondent's assertions (Resp. Br. 23-24, neither *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (June 26, 1989) nor *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 498 (1985) weaken the Second and Eighth Circuit's interpretation of RICO or its legislative history, as in both cases the crime charged was classically economic in nature and merely continued the tradition of applying RICO to crimes having an economic dimension.

What both *H.J. Inc.* and *Sedima* do stand for, however, is the proposition that sound interpretation of RICO requires both an analysis of the language of RICO and its legislative history. *H.J. Inc.* at 4952-53, *citing Sedima* at 486-90 (Court opinion), 510-519 (Marshall, J., dissenting), 524-527 (Powel, J., dissenting); *Russello v. United States*, 464 U.S. 16, 26-29 (1983); *United States v. Turkette*, 452 U.S. 576, 586-587, 589-593 (1981). Yet, rather than engage in an analysis of the statute itself and its legislative history, both respondent (Resp. Br. 23-24) and the Third Circuit (Pet. App. 12) rely exclusively upon this Court's observations in *Sedima* regarding the breadth of the RICO statute as if it was meant to dispense with the need for analysis and a thinking approach to its application. If federal courts take this view, then the rule for all RICO actions will be simply "he who files first, wins" and, as in this case, RICO means anything inventive plaintiff's counsel defines it to mean.

V. There Is No Standing To Base a RICO Violation On Predicate Acts To Others Having No Resultant Harm

Respondent's suggestion that there is nothing remarkable in permitting the extortion of its employees to serve as predicate acts for its claimed RICO violation ignores the lower court's admission that resolution of the issue presented by petitioners "raises a novel question regarding the predicate acts requirement of RICO" (Pet. App. 89 n.11) and begs the question. Where there is no injury to the third party against whom the conduct is directed, there is no vicarious harm to another by virtue of that predicate act. Respondent admits it has not been

damaged by the extortion of its employees. (Resp. Br., 26, n.30). The jury found that the only RICO injury suffered by the respondent was $887 in property damage during the sit-in of August 10, 1985 (Pet.App.10, 257-58). Although the jury found that petitioners had interfered with the contractual relations of the clinic's employees (co-extensive with the RICO "extortion" of their right to continued employment), the jury found *no damages had resulted therefrom.* (Pet.App. 260). The jury nevertheless based RICO liability upon extortion of the employees as one of the two predicate offenses on which to base the RICO violation. (Pet.App 255-256). This directly conflicts with this Court's decision in *Sedima* that the plaintiff has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. *Sedima*, 473 U.S. at 495.

VI. Review By This Tribunal Is Warranted When the Court Below Deems Conduct To Be Extortionate and In Violation of the Hobbs Act, 18 U.S.C. §1951 Even Though the Alleged Perpetrator, Or A Related Third Party, Neither Obtains Nor Attempts To Obtain Any Tangible or Intangible Property

The property which respondent maintains was extorted by petitioners is its intangible right to "operate its business and make decisions freely." (Resp. Br. 28) Respondent does not address petitioners' central contention that a Hobbs Act extortion is not established absent a showing that the defendant (or a related third party) either acquired or attempted to acquire tangible or intangible property.[10] Respondent's assertion that the requirement of "obtaining property" is fulfilled because petitioners and others engaging in political protest might have felt personal relief if respondent stopped performing induced abortions (Resp. Br. 28, n.32) merely serves to underscore the

10. Respondent attempts to obfuscate the issue by raising an unrelated contention which was not raised in the Petition. Petitioners concede there is ample authority for the proposition that intangible property may be extorted under the Hobbs Act. The cases which respondent cites as authority for this proposition (Resp. Br. 28) simply reiterate a point which is not raised in the petition. (Petition 25-28).

extraordinary breadth of the decision below, and its extension of RICO's grasp into the nation's political arena. Clearly, no economic advantage or power can be identified in this context.[11]

VII. Review By This Court Is Entirely Appropriate When A Federal Court of Appeals Renders A Decision Conflicting With Both Its Own Precedents and Those Of Other Federal Courts of Appeals On the Same Matter

Petitioners contended in their post trial motions, and on appeal in the court below, that the district court's charge on trespass damages was incomplete and misleading. Respondent answered these contentions, on the merits, without claiming waiver.

Petitioners, in their briefs, twice advised the Third Circuit that a written point for charge outlining the correct measure of damages for common law trespass had been submitted to the district court which it had declined to provide to the jury. See Main Brief of Petitioner Juan Guerra, et. al. at No. 88-1336, 40 and 42. Thus, the lower court was advised by petitioners how and when their challenge to the lower courts' charge on trespass was preserved.[12] The lower court's statement that petitioners failed to provide the lower court with a reference to the record

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11. Respondents do not cite a single case which stands for the proposition that extortion can be proven absent a showing that the perpetrator obtained or sought to obtain property of another. Respondent's reliance upon *United States v. Local 560,* 760 F.2d 267 (3rd Cir. 1985) is misplaced since defendants in *Local 560* intimidated union members into giving up their statutory right to participate in union affairs which thus clearly provided defendants with an identifiable economic advantage by enabling defendants to acquire control of the Local. No such economic advantage is identifiable in the matter *sub judice.* The appropriation of an economic benefit is readily ascertainable in each of the other cases relied upon by respondent as well.

12. Petitioners did not elaborate on the waiver issue in their Main Briefs since respondent declined to assert waiver until it filed its second brief with the lower court and had never asserted such a claim in the district court. Petitioners waiver claim itself was thus untimely.

In addition to refusing to provide the jury with the correct instruction on the measure of damage for trespass, the district court also declined to rule upon petitioners' proposed point on trespass damage.

wherein the issue had been preserved is shockingly incorrect. The cases cited in Section V of the Petition amply demonstrate the conflict in the circuits, which respondent has failed to address or refute.

CONCLUSION

For the reasons stated above and in the petition for certiorari, petitioners respectfully request that the petition for writ of certiorari be granted.

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APPENDIX

EXCERPTS FROM NOTES OF TESTIMONY

* * *

[11-62]

MR. SHORT: My own position on the extortion, there has to be a thing of value exacted, that the statutes concerning extortion, specifically statutes concerning extortionate picketing all come from the labor management relations act in the labor relations field. To give you some type of background about what extortionate picketing is. Extortionate picketing and extortionate protest activity of that nature is described in Section 602 of the Labor Management Relations Act. "It's unlawful to carry a picket on or about the premises of an employer for the purpose of or as part of a conspiracy in the furtherence of any plan or purpose—" The key word, "personal profit or enrichment of any individual by taking or obtaining any money or one other [sic] of value from such employ against his will or without his consent." So the purpose of that is [11-63] obtaining property for one's own enrichment and the value that's being exacted is the employment relations between the individuals and maybe the loss of income and he mentioned is his three theories. The point is that is does not fall within extortion when you have to prove in RICO, when you have to plead and prove an act, a crime. He pleads extortion. He has to prove a common law extortion and again, the heart of that is exacting something for the personal enrichment of the individual.

In this case, the individuals, if they are exacting anything, if there is that pattern of activity to show they are exacting anything, it's not personal financial enrichment. There is an enrichment, a savings in their mind that has been expressed or could be inferred from the evidence that would be satisfied if they obtained the ceasing of abortions being performed by the Northeast Women's Center, but there is no pressure or threat to exact the compensation, that pecuniary gain, that profit, that thing of value.They are stating the thing of value is their loss of this employment relationship. That fits into your pendant state claim and your business tort, but the purpose of RICO—of

addressing these things, the focus of RICO and the Congressional focus which still has not been thrown out, is to combat the use of RICO as a business tort activity. The focus is on economic advantage obtained through the fruits of racketeering activity. So, the [11-64] extortion has to fit the RICO purpose and it's just not here. The extortionate activity, if he wants to argue in general a theory as it affects his business tort claim, we can do that whether [sic] we get onto that topic and I am not giving that up. It's not there for the purpose of RICO activity and the exacting of economic gain.

THE COURT: Supposing I extorted something from you and just said unless you give a contribution to the University of Pennsylvania, I am going to picket you. I am a fund raiser. I am an alumni of the University of Pennsylvania and I want to see them prosper. I am doing it because I think the University of Pennsylvania ought to have all the money that it needs and wants and you are a businessman, unless you give something to somebody else, I am going to picket you and I am going to use extortionate means to do it. What are your thoughts on that?

MR. SHORT: As far as extortionate picketing, that would fit under the labor management relations act.

THE COURT: Forget whether it's picketing. It's not labor related. I am going to call you everything in the world. I am going to say you buy foreign goods and [sic] put American workers out of work. There is no business relationship between us.

MR. SHORT: You are not going to stop until I give up something of value to somebody else?

THE COURT: Yes [11-65]

MR. SHORT: In that case you are exacting an economic gain, but here, you are not exacting an economic gain.

THE COURT: Well, the theory of the plaintiff's which I am anticipating, is that your group has put such effort, as I understand it, on the part of the plaintiff, that they have either had to circum [sic] to your pressure or willingly go out and hire security guards, extra security, which is what they have voluntarily given up. That's just my general thinking on it. So this is something they gave up and this is the $49,000.

MR. SHORT: If they prevail on the business tort.

THE COURT: They also say it's extortion.

MR. SHORT: That's not correct.

THE COURT: That's the theory of what they are giving up. It's not coming back to you.

MR. SHORT: They are taking a dollar amount on what they gave up. The security costs and they are putting a dollar amount on it and saying this is what we had to give up on response to their activities?

THE COURT: Right.

MR. SHORT: The thrust an [sic] purpose of extortion, you have to prove a common law term, to exact something of value, specific intent. Extortion is a specific intent crime. You have to prove it.

THE COURT: The value in this situation is for them to stop performing abortions, that's what you want. [11-66]

MR. SHORT: That's not what they gave up.

THE COURT: You are trying to get them to give it up. This is attempted extortion. Maybe I am speaking too much on the part of the plaintiff in this case.

MR. SHORT: It's not an economic advantage. You have to look at the purpose of the RICO Act. They want to get the District Attorney to prosecute an extortion—

THE COURT: They are not required to do that under RICO.

MR. SHORT: They're not.

THE COURT: They are alleging robbery but they don't have to have somebody convicted of robbery.

MR. SHORT: But they have to prove the elements within this action here.

THE COURT: I understand that. I agree with you. They have to prove it. What's your theory.

MR. TIRYAK: I think the principal problem in the analysis that you just heard is that the Labor Relations Act is not one of the statutes that's listed. It's the Hobbs Act and that's extortion we're talking about. The Hobbs Act makes it clear that extortion, whoever, in any way or degree obstructs or delays or after

effects commerce, does not have to show anything else.The case on point is the Harry Janotti.

[11-67]

case, where the argument was that nobody was ever going to give him any money. The whole thing was a scam. There couldn't have been an extortion because he couldn't have gotten any value and the Third Circuit said that does not matter. Attempted extortion counts. We have cited in our brief and I haven't heard anything replace to these cases, the Cirillo case, a Third Circuit case, which makes it clear that the person who is committing the extortion does not have to be getting a thing of value, and in fact, in a typical extortion situation, the guy that is going out to strong arm somebody is not the person that's going to get the money. That's almost always the circumstances in an extortion.

MS. CONNELLY: Can I read that section that I have been trying to read, from the Hobbs Act, Section 1951(B) (2): "The term, 'Extortion' means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence, fear or under color of official rights." That "extortion" is and that's not what Mr. Tiryak said it was.

[16-2]

(Whereupon, the following transpired at sidebar with all counsel being present:)

THE COURT: I am going to send the definition of extortion out and I am going to allow counsel to write up what they think the robbery is and I will decide that later, but at least we can send the extortion one out.

"Mr. Stanton: Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion of then transferred to a third-party and that the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary."

MR. SHORT: This leaves out the intent portion that you read when you gave the jury charge.

MR. TIRYAK: This is a Hobbs Act extortion. It has nothing to do with New York law and New York jury instructions and it's clear under the Jannotti case, there was nothing to be extorted, because the entire operation was a scam, this is the [16-3] same instruction you gave. We have already made arguments about it.

* * *

DEFENDANTS EXHIBIT S-5 POINTS FOR CHARGE ON EXTORTION FROM NEW YORK STANDARD JURY INSTRUCTIONS

EXTORTION

Under the law, a person is guilty of extortion if he obtains property from his victim, who must also be the owner of the property, through the use of fear and in so doing affects Interstate Commerce.

A person does not obtain property unless he has the intent to appropriate the property. Appropriate means to permanently or for an extended period of time exercise control over the property. Intent to appropriate means that the defendant must have a conscious aim or objective to appropriate the property to himself or to another.

Examples of "through the use of fear" would include threats to cause physical injury or threats to damage another's property.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC.	:	
vs.	:	CIVIL ACTION
MICHAEL McMONAGLE, et al	:	NO. 85-4845

MEMORANDUM TO THE TRIAL JUDGE SUR JURY DELIBERATION QUESTION

ISSUE: What response to give to jurors when, after a day and one-half of deliberations, the foreperson requests a definition of "Robbery under RICO" and "Extortion under RICO"?

DISCUSSION: Upon a request by the jury marked Court Exhibit C-11, the Trial Judge sought comments of counsel. Counsel were unable to agree. The definition of crimes under RICO can either be according to state law or according to other definitions specified under assorted federal laws. Here, the Plaintiff has elected to proceed and allegedly prove its case according to the definition of crimes in The Hobbs Act. In the Court's initial charge on May 11, 1987, the Trial Judge issued a charge consistent with the Hobbs Act definitions. Now, upon the Jury's request, the Court has proposed an instruction on Extortion that also includes unsolicited instructions on the definition of property. The wording of the proposed instruction unduly gives credence to Plaintiff's theory of the case and is worded in such as a way as to give a conclusive or mandatory instruction to the jury. Defense counsel object and request a more example free instruction such as the one set forth in Slatzburg-Perlman's publication on jury instructions. As example follows on page 2.

PROPOSED ANSWER:

EXTORTION: To find that a person is guilty of extortion under the law as it applies to this case, you must believe beyond a preponderance of the evidence that three things are true:

1. A person obtained or conspired to obtain money or something of value from the person of The Northeast Women's Center with the Northeast Women's Center's consent; and

2. The person obtained this consent by threatening to injure the Center or its property in some way; and,

3. The person's actions in some way, however slight, interfered with, delayed or affected the flow of business activities of the Center or the movement of any article or thing between two or more states.

ROBBERY: This defense counsel has no objection to the proposed answer of the Court. The answer drafted by the Court is consistent with the prior charge and is example neutral. It answers as clear and as concise as is practical.

Respectfully submitted

Thomas J. Short, Esquire
Attorney for Linda Corbett, Pat McNamara, and Thomas McIlhenny

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST WOMEN'S CENTER, INC. *Plaintiff*	:	CIVIL ACTION
vs.	:	
MICHAEL McMONAGLE, et al *Defendants*	:	NO. 85-4845

MOTION TO CORRECT DEFECT IN JURY INSTRUCTIONS REGARDING PLAINTIFF'S RICO COUNT

Respectfully submitted,

Charles F. Volz Jr., Esq.

MOTION TO CORRECT DEFECT IN JURY INSTRUCTIONS REGARDING PLAINTIFF'S RICO COUNT

Charles F. Volz Jr., Esquire, on behalf of the several defendants he represents in the instant matter, hereby requests that this Court issue the following curative instructions in response to the jury's request for the definition of robbery and extortion, and states in support thereof:

1. In the Amended Complaint filed by the Northeast Women's Center, the plaintiff claimed the predicate offenses of extortion, robbery, mail and wire fraud. Amended Complaint, ¶55.

2. The predicate offenses of mail fraud and wire fraud were not pursued during trial.

3. At no time did the plaintiff plead attempted robbery and attempted extortion as predicate offenses. At no time did the plaintiff plead conspiracy to commit robbery or conspiracy to commit extortion.

4. Section 1961 of the RICO act defines "racketeering" activity to mean "any act or treat involving . . . robbery . . . extortion. The act itself does not make the attempt to commit robbery and/or extortion predicate offenses.

5. Plaintiff's claim for relief pursuant to the RICO statute, ¶¶80 through 83 was limited to the predicate acts alleged, i.e., robbery and extortion, and was therefore confined to §1962(c). Plaintiff never plead a conspiracy to violate RICO pursuant to §1962(d).

6. Plaintiff only plead a conspiracy in ¶84, pertaining to the alleged violations of the Sherman Antitrust Act.

7. Under the RICO law, only the government could alleged a conspiracy or attempt to violate the Hobbs Act as a predicate offense, a private litigant cannot. Pursuant to §1964(b), the "attorney general may institute proceedings under this section" and there is no requirement of harm,

damages, or injury. §1964(c) establishes a private cause of action only for "any person injured in his business or property by reason of a violation of Section 1961 . . ." The language of the Act and the holding of *Sedima* prohibit a private civil litigant from alleging a conspiracy or attempt to violate the Hobbs Act as a predicate offense because, by definition, a conspiracy or attempt would have no impact on his business or property. Therefore, this plaintiff cannot rely on inchoate crimes as predicate offenses on Section 1962(d).

8. Despite the aforesaid, this Court gave the jury a charge containing attempted robbery and attempted extortion as predicate offenses.

9. Additionally, this court presented the jury with Interrogatory No. 4, which pertains to a conspiracy, which this plaintiff lacks standing to assert. Also, compounding the error in Interrogatory No. 4 is Interrogatory No. 5 which deceptively refers to one overt act, but which should at least speak to one overt act to commit each of the required two predicate offenses.

10. As the jury has propounded a question concerning the definition of robbery and extortion, it is not too late for this court to issue the curative instructions suggested herein.

ROBBERY

One of the acts of racketeering activity alleged committed by these defendants is that of robbery concerning the 8/10/85 incident at the Northeast Women's Center. In order to establish the crime of robbery, the plaintiff must prove each of the following six [6] elements by a preponderence of the evidence:

(1) that the defendants forcibly took and carried away

(2) with the specific intent to steal

(3) the personal property of the Northeast Women's Center

(4) taken from the person or another by violence or putting in fear

(5) with the intention to permanently keep the property so taken.

(6) and that in so doing interstate commerce was adversely affected.

An attempt to commit robbery is insufficient to establish the crime of robbery.

[*U.S. vs. Nedley*, 255 F.2d 350, 357 (2d Cir. 1958)]

EXTORTION

One of the acts of racketeering activity alleged committed by these defendants is that of extortion. In order to establish the crime of extortion, the plaintiff must prove the following three [3] elements by a preponderence of the evidence:

(1) that the defendants induced or caused the Northeast Women's Center to part with property;

(2) that the defendants obtained the property of the Northeast Women's Center with its consent, induced by the wrongful use of actual or threatened force, violence, or fear, and

(3) that is so doing, interstate commerce was delayed, interrupted or adversely affected.

An attempt to commit extortion is insufficient to establish the crime of extortion.

[§56.04 Fed. Jury Practice, Devitt & Blackmar]

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PROPOSED EXAMPLE FOR JURY AS TO ROBBERY AND EXTORTION

(taken from 91 Cong.Rec. 11911 (1945), in the debates over the Hobbs Act)

A farmer with a load of produce – milk, butter, eggs, vegetables, potatoes (things he has raised and produced upon his farm and which he owns) – approaches a state line in going to the market. His wife and his children accompany him. He is stopped by a group of individuals who demand that he stop his truck and pay them $9.00 if he wants to cross the line and get to the market. The farmer states that he doesn't want to pay the $9.00. The group of individuals state that if he doesn't pay the $9.00, they will knock him in the head, or knock his wife or children in the head. Fearing for his own well being or that of his wife or children, the farmer pays the $9.00. This is the example of a robbery.

If his wife and children were not with him, but the farmer nonetheless feared for their safety and voluntarily parted with the $9.00, this would be an extortion.

Respectfully submitted,

Charles F. Volz Jr., Esq.

SUPREME COURT OF THE UNITED STATES

MICHAEL McMONAGLE ET AL. *v.* NORTHEAST WOMEN'S CENTER, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88–2137. Decided October 10, 1989

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

A question presented in this case is whether RICO liability may be imposed where neither the "enterprise" nor the "pattern of racketeering activity" had any profit-making element. The Second and Eighth Circuits have held that it may not. *United States* v. *Ivic*, 700 F. 2d 51, 58–65 (CA2 1983) (enterprise or predicate acts must have financial purpose); *United States* v. *Flynn*, 852 F. 2d 1045, 1052 (CA8), cert. denied, 488 U. S. —— (1988) (enterprise must be directed toward economic goal). The Third Circuit in this case upheld RICO liability despite the absence of any economic motivation on the part of the defendants. I would grant certiorari to resolve the conflict.

On last Monday's order list, the Court also denied certiorari in the following cases:

Norton v. *United States*, No. 88–1889, cert. denied, *ante*, p. ——: The Eleventh Circuit held that law enforcement officers reasonably relied on warrants calling for the search and seizure of "'all corporate records . . . which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18 of the United States Code,'" and that the evidence seized pursuant to that warrant was admissible under the good faith exception to the exclusionary rule articulated in *United States* v. *Leon*, 468 U. S. 897 (1984). 867 F. 2d 1354, 1360 (1989). The decision of the Eleventh Circuit conflicts with the Tenth Circuit's decision that a warrant ordering the

seizure of all records "relating to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act, 22 U. S. C. 2278, and the Export Administration Act of 1979, 50 U. S. C. App. 2410," was so facially overbroad that law enforcement officers could not reasonably rely on it, *United States* v. *Leary*, 846 F. 2d 592, 594 (1988), and a similar decision of the Ninth Circuit suppressing evidence seized under a warrant seeking "documents, books, ledgers, records and objects which are evidence of violations of federal criminal law." *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F. 2d 747, 749 (1989). The conflict should be resolved.

Bergen v. *F/V St. Patrick*, No. 88–1960, and *Kidd* v. *F/V St. Patrick*, No. 88–1762, cert. denied, *ante*, p. ——: The Ninth Circuit held that where a Death on the High Seas Act claim, 41 Stat. 537, 46 U. S. C. § 761 *et seq.*, is joined with a Jones Act claim, 41 Stat. 1007, 46 U. S. C. § 688, neither statutory scheme may be supplemented by an award of punitive damages under general maritime law. 816 F. 2d 1345 (1987), modified, 866 F. 2d 318 (1989). This holding is contrary to the Fifth Circuit's decision in *In re Merry Shipping, Inc.*, 650 F. 2d 622, 625–626 (1981), that punitive damages are available under general maritime law even when such a claim is joined with a Jones Act claim. The conflict should be resolved.

Tiller v. *Fludd*, No. 88–2088, cert. denied, *ante*, p. ——: The Eleventh Circuit held that *Batson* v. *Kentucky*, 476 U. S. 79 (1986), prohibits the use of race-based peremptory challenges by an attorney in a civil action. The Eleventh Circuit concluded that the trial court's participation in the exercise of the peremptory strikes provided the state action necessary to a violation of the Equal Protection Clause. 863 F. 2d 822 (1989). The Eighth Circuit has expressed "'strong doubts'" whether *Batson* applies to civil actions, see *Swapshire* v. *Baer*, 865 F. 2d 948, 953 (1989); *Wilson* v. *Cross*, 845

F. 2d 163, 164 (1988), and this important issue should be resolved.

Caraballo-Sandoval v. *United States*, No. 88–7438, and *Caraballo-Lujan* v. *United States*, No. 88–7490, cert. denied, *ante*, p. ——: Pursuant to 21 U. S. C. § 853(a) (1982 ed. Supp. V), defendants convicted of serious federal narcotics offenses must forfeit to the United States any assets derived from, or used in, the commission of those crimes. 866 F. 2d 1343 (CA11 1989). The question here is whether, in this context, due process requires courts to provide a pretrial hearing to determine if some likelihood exists that the assets at issue will ultimately be subject to forfeiture. The Eleventh Circuit's resolution of this issue in this case conflicts with the Ninth Circuit's conclusion in *United States* v. *Crozier*, 777 F. 2d 1376, 1383–84 (1985). The conflict should be resolved.

Automobile Importers of America, Inc. v. *Minnesota*, No. 89–72, cert. denied, *ante*, p. ——: The Eighth Circuit held that the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2183, 15 U. S. C. § 2301 *et seq.*, does not pre-empt state efforts to regulate private dispute resolution mechanisms established by manufacturers to settle warranty disputes with consumers. 871 F. 2d 717 (1989). The Eighth Circuit's decision comports with that of the Fifth Circuit in *Chrysler Corp.* v. *Texas Motor Vehicle Comm'n*, 755 F. 2d 1192 (1985), but conflicts with the Fourth Circuit's decision in *Wolf* v. *Ford Motor Co.*, 829 F. 2d 1277 (1987). The conflict should be resolved.

Rayner v. *Smirl*, No. 89–82, cert. denied, *ante*, p. ——: The Fourth Circuit held that the whistleblower provision of the Federal Railroad Safety Act, 84 Stat. 971, as amended, 45 U. S. C. § 441(a), pre-empts a state-law action for wrongful discharge of a supervisory railroad employee who reports his employer's railroad safety violations. 873 F. 2d 60 (1989). In *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N. E. 2d 372 (1985), cert. denied, 475 U. S. 1122 (1986), the Illinois Supreme Court reached a contrary result

under a nearly identical statute, holding that the whistleblower provision of the Energy Reorganization Act, 92 Stat. 2951, 42 U. S. C. § 5851, did not pre-empt a state-law action for wrongful discharge of an employee who reported nuclear safety violations. The issue should be addressed.

Witters v. *Washington Dept. of Services for Blind*, No. 89–94, cert. denied, *ante*, p. ——: Petitioner was disqualified from receiving vocational aid under a state program that is primarily federally funded because he wants to study to become a minister. After the denial of aid to petitioner was upheld by the Washington Supreme Court, 102 Wash. 2d 624, 689 P. 2d 53 (1984), this Court granted certiorari. We reversed, 474 U. S. 481 (1986), concluding that the Establishment Clause presented no constitutional barrier to the vocational aid scheme, and remanded for further factual development and consideration of the program's legitimacy under the stricter dictates of the Washington Constitution's establishment clause. On remand, the Washington Supreme Court again upheld the denial of aid, this time on state constitutional grounds. 112 Wash. 2d 363, 771 P. 2d 1119 (1989). Petitioner now presses a free-exercise claim under our *Sherbert* v. *Verner*, 374 U. S. 398 (1963), line of cases. This case presents important federal questions regarding the free exercise rights of citizens who participate in state aid programs that permit recipients a private choice in using funds received and regarding the extent to which state involvement with religion that does not violate the Establishment Clause is required by the Free Exercise Clause. The fact that eighty percent of the program's funding is federal also may raise significant Supremacy Clause issues. These important federal questions deserve attention.

Urquhart & Hassell v. *Chapman & Cole*, No. 89–107, cert. denied, *ante*, p. ——: Petitioner asked us to consider the Fifth Circuit's decision that an abuse-of-discretion standard applies in a case under Federal Rule of Civil Procedure 11 when Courts of Appeals review district court determinations

on questions of law and fact. 865 F. 2d 676 (1989). Other Circuits have applied a *de novo* standard to questions of law in this context. See, *e. g.*, *Zaldivar* v. *Los Angeles*, 780 F. 2d 823, 829 (CA9 1986). We should resolve this conflict.

Enco Manufacturing Co. v. *Clamp Manufacturing Co.*, No. 89–199, cert. denied, *ante*, p. ——: A question presented in this case is whether a district court's finding of a likelihood of confusion in a trademark infringement matter under Section 43(a) of the Lanham Act, 60 Stat. 449, as amended 15 U. S. C. § 1125(a), is reviewable under the "clearly erroneous" standard, as a finding of fact, or *de novo*, as a conclusion of law. 870 F. 2d 512 (CA9 1989). I have noted before that federal courts disagree over this question. See *Euroquilt, Inc.* v. *Scandia Down Corp.*, 475 U. S. 1147 (1986) (WHITE, J., dissenting from denial of certiorari); *Elby's Big Boy of Steubenville, Inc.* v. *Frisch's Restaurants, Inc.*, 459 U. S. 916 (1982) (same). We should resolve the conflict.

MEBA Pension Trust v. *Rodriguez*, No. 89–206, cert. denied, *ante*, p. ——: The Fourth Circuit held that the Employment Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended 29 U. S. C. § 1001 *et seq.*, applies to a denial of benefits, when the denial is based on an action by the plan prior to ERISA's effective date. 872 F. 2d 69 (1989). Other Courts of Appeals have held to the contrary. See, *e. g.*, *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F. 2d 1496, 1501 (CA9 1984). This conflict should be resolved.

Boyd v. *Alabama*, No. 89–5053, cert. denied, *ante*, p. ——: The Alabama Supreme Court held that a warrantless search of an automobile in police custody need only be supported by probable cause. A showing of exigent circumstances is not required. 542 So. 2d 1276 (1986). Although this Court's decisions in cases such as *United States* v. *Johns*, 469 U. S. 478, 484 (1985); *California* v. *Carney*, 471 U. S. 386 (1985); and *Michigan* v. *Thomas*, 458 U. S. 259, 261–262 (1982) *(per curiam)*, appear to have foreclosed a contrary position, some courts have continued to require a showing of ex-

igent circumstances before validating a warrantless automobile search. See, *e. g.*, *United States* v. *Alexander*, 835 F. 2d 1406, 1410 (CA11 1988); *United States* v. *Hepperle*, 810 F. 2d 836, 840 (CA8 1987). We should address this issue.

Farrell v. *Illinois*, No. 89–5233, cert. denied, *ante*, p. ——: The Illinois Appellate Court held that petitioner's affirmative response to a judge's question during his initial appearance regarding whether petitioner was going to hire an attorney was not enough to invoke petitioner's Sixth Amendment right to counsel under *Michigan* v. *Jackson*, 475 U. S. 625 (1986), and so did not bar further police-initiated interrogation. 181 Ill. App. 3d 446, 536 N. E. 2d 476 (1989). The Illinois Supreme Court denied discretionary review. —— Ill. 2d ——, 541 N. E. 2d 1110 (1989). This holding is directly contrary to the holdings of *Fleming* v. *Kemp*, 837 F. 2d 940, 947 (CA11 1988) *(per curiam)*, and *Wilson* v. *Murray*, 806 F. 2d 1232, 1235 (CA4 1986), cert. denied, 484 U. S. 870 (1987). The conflict deserves our attention.